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THE EFFECT OF PENAL LEGISLATION IN THE LAW OF TORT

I'm the Parliamentary Draftsman,
I compose the country's laws,
And of half the litigation
I'm undoubtedly the cause.

—J.P.C., *Poetic Justice* (1947).

It is a favourite charge; and yet (if we may breathe it) others than the draftsman are sometimes accountable for the trouble in interpreting statutes. Good rules of interpretation, consistently applied, could do much to reduce the area of doubt. It is the absence of such rules, or the failure to apply existing rules with sufficient regularity to preserve their character as rules, that has brought about the situation in which it is almost impossible to predict when statutory standards of behaviour will be imported into the law of tort.

The present position of penal legislation in the civil law—and it is only of penal legislation that we are speaking, since a study of other legislation would extend the discussion too much—the position of penal legislation may be oversimplified into two generalisations. When it concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored. There are exceptions both ways, but, broadly speaking, that is how the law appears from the current decisions. One may make bold to say that both propositions are the result of a wrong approach to the problem of assimilating statutory rules into the civil law.

I

Industrial legislation like the Factories Act, 1937, and the Mines and Quarries Act, 1954, together with the maze of regulations made under them, are regularly interpreted to give a cause of action in tort. Quite apart from any question of absolute liability, it is a considerable advantage to a plaintiff to be able to found his claim

upon a breach of statutory duty, because the statute crystallises or "concretises" the duty issue. The duty at common law is to prevent injury or damage, and a defendant cannot be accounted guilty of negligence unless he unreasonably failed to foresee and prevent the damage. But a statutory rule is an authoritative formulation of the steps to be taken to minimise danger. The duty under the statute¹ is to comply with its words; and if, through non-compliance, damage follows (even unforeseeably), the defendant may be held liable. It is not for him to say that he was in no position to foresee the danger, for the legislature, acting probably under expert advice, has foreseen it for him.

To give an illustration, one of the Building Regulations has the effect in some situations of replacing the question "Did the employer take reasonable care for the safety of his workmen?" by the precise question: "Was the working platform on which the workman was put to stand at least 25" wide?"² If the platform is only 24" wide, and if the workman would probably not have fallen off it had it been 25", he will recover damages. (Even if the platform is 25" wide, it will still be open to the workman to argue that it should be at least 26" wide to satisfy the master's duty of care at common law; but the formulation of the issue here will not be so precise, nor its outcome so predictable.)

A weakness in the statutory protection of the workman is the introduction of the theory of causation. In the case just put, the workman cannot recover damages for breach of statutory duty unless he can show that he would not have fallen off if the platform had been 25" wide. Suppose the workman was afflicted with an attack of giddiness; in that case the extra inch would probably not have saved him, and he will fail on this issue. If he simply turned his foot over the edge, the extra inch might have saved him—but how can anyone decide that it would *probably* have done so? The question will be made all the more difficult of solution if the workman was killed and so cannot testify.

At one time it seemed that the courts were prepared to place the burden on the employer to disprove causation³; but this is now overruled, and the burden rests on the plaintiff to show that the breach caused or made a material contribution to his injury.⁴ As always, the courts proceed on the reasonable probabilities of the case; and the natural sympathy of the judges for an injured workman, coupled with the unfavourable impression produced by the

¹ In this article the word "statute" will be used to include rules made under statutes.

² Building (Safety, Health and Welfare) Regulations, 1948, reg. 22 (b).

³ *Vyner v. Waldenberg Bros., Ltd.* [1946] K.B. 50 (C.A.).

⁴ *Bonnington Castings, Ltd. v. Wardlaw* [1956] A.C. 613 (H.L.(Sc.)); *Nicholson v. Atlas Steel Foundry & Engineering Co., Ltd.* [1957] 1 W.L.R. 613 (H.L.(Sc.)); *Quinn v. Cameron & Robertson, Ltd.* [1958] A.C. 9 (H.L.(Sc.)); *Clarke v. E. R. Wright & Son* [1957] 1 W.L.R. 1191 (C.A.); cf. *Dawson v. Murex, Ltd.* [1942] 1 All E.R. 483 (C.A.).

evidence of the employer's breach of statutory duty, may account for the fact that in practice doubts are somewhat readily resolved in favour of the workman.⁵

The problem of causation does not always dog the plaintiff. There are cases where the causal connection is clear, and the importance of the statutory duty in respect of the defendant's liability stands revealed. Suppose that the occupier of a factory has a lift on the premises which closes with two trellis-type gates. An employee standing on the landing puts his hand through the two gates. Someone else starts the lift by pressing the call-button; the gates close, and the employee's hand is injured. The occupier is not liable at common law, because he could not be expected to foresee that an adult would do such a silly thing as to put his hand into such obvious danger. But since there is a statutory duty to fence lifts in such a way as to prevent any person falling down the shaft or coming into contact with any moving part, the occupier is held to be in breach of the duty, and is therefore liable to the factory employee (subject to reduction for his contributory negligence).⁶ All question of foresight of injury disappears, because the standard of care has been authoritatively and precisely fixed by the legislature.

The statutory liability in these cases is said to be strict or absolute, and it is so in the sense that the occupier may be made liable for a consequential injury which (had there been no statute) he could not reasonably have been expected to foresee. It must be noted, however, that the situation is not one in which the occupier was guiltless in respect of the breach of statutory duty. To revert to the last example, the statute requires the occupier to fence the lift, and had the occupier attended to the words of the statute, interpreting them in the way in which the judges interpret them, he would have seen that he was not complying with the statute by having gates through which the hand could be inserted. The breach of the statute is a negligent breach; indeed, on the

⁵ The plaintiff won in the cases cited in the previous note, but lost on the issue of statutory duty in *Nolan v. Dental Mfg. Co.* [1958] 1 W.L.R. 936. There, the employer omitted to perform his statutory duty of providing goggles for the workman, but the workman failed in an action on the statute, since he could not show that he would probably have worn the goggles if they had been provided. He recovered, however, at common law, since the employer could probably have overcome the workman's inertia by taking sufficiently active measures of enforcement. The decision on the issue of statutory duty is not easy to reconcile with the later case of *Jenner v. Allen West & Co., Ltd.* [1959] 1 W.L.R. 554 (C.A.), where employers failed to provide crawling boards as was their statutory duty to do, but provided scaffold boards which the servant could have used in place of crawling boards but did not. In an action by the servant's widow, it was held that a causal connection could be traced between the lack of crawling boards and the death, "for the provision of special gear is, in itself, some incentive to its use."

⁶ *Blakeley v. C. & H. Clothing Co.* [1958] 1 W.L.R. 378. Cf. *Smith v. Chesterfield & District Co-op. Socy., Ltd.* [1953] 1 W.L.R. 370 (C.A.); *Harrison v. Metropolitan-Vickers Electrical Co., Ltd.* [1954] 1 W.L.R. 324 (C.A.); *Dunn v. Bird's Eye Foods, Ltd.* [1959] 2 W.L.R. 812.

theory that persons are deemed to know the law regulating their conduct, it is an intentional breach. One cannot infer from a decision that the occupier is liable for the unforeseeable consequences of an intentional or negligent breach that the occupier would be liable if the breach were not negligent on his part.

This point may emerge more clearly if we consider the function of the courts when they lay down duties of care at common law. A rule imposing a duty of care in particular circumstances is a value-judgment, because it judges that the interest of the plaintiff in being free from the risk of damage or injury is superior to that of the defendant in going his own way and in saving effort or money. Now when the legislature lays down the statutory duty, it settles the value-judgment implicit in the negligence issue, supplanting the judge in deciding what risk inheres in conduct and what means may be expected to be used to minimise the risk. Because the statutory duty may result in a different determination of the case from that at common law, it may be said that the statute has imposed absolute liability. But, all the same, this is sometimes a misleading way of expressing the result, for by hypothesis the defendant knew (or is deemed to have known) that he was not complying with the statute, and he presumably knew that, in the view of the legislature, his non-compliance created an unreasonable risk for the plaintiff. In such circumstances it is better to speak of statutory negligence than of absolute liability. Statutory negligence is a form of fault in which the standard of conduct has been fixed by the legislature instead of by the judge.

Support for this opinion may be found in a dictum of Lord Atkin. Expressing the opinion that an action for breach of statutory duty could accurately be described as an action for negligence, Lord Atkin said:

“If the particular care to be taken is prescribed by statute, and the duty to the injured person to take care is likewise imposed by statute, and the breach is proved, all the essentials of negligence are present. I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy.”⁷

To the same effect, Lord Wright remarked that although the standard of duty was fixed by the statute and not by the jury, its breach could correctly be described as statutory negligence. “The duty is the same in kind [as the duty at common law] in this respect, that it is a duty to take precautions and care for the safety

⁷ *Lochgelly Iron & Coal Co. v. M'Mullan* [1934] A.C. at 9 (H.L.(Sc.)), Lord Atkin repeated his opinion in *East Suffolk Catchment Board v. Kent* [1941] A.C. at 88, and it was approved by Viscount Simon L.C. in *Lewis v. Denye* [1940] A.C. at 924.

of the workmen; it is a duty to take care which is owed to the workman, and which if broken constitutes negligent conduct."⁸

The words used by the legislator may embody a greater wisdom than the legislature could have foreseen. Thus, the Factories Act imposes a duty on employers to take all practicable measures to prevent the inhalation of dust by workmen. It was held to be no excuse for the non-performance of the duty to say that at the date in question the particular dust was reasonably thought by all concerned (including experts) to be harmless. If the dust is afterwards found to have been injurious, the employers will be liable in damages for breach of the statute.⁹ Even this decision, severe though it is, does not imply absolute liability. The employer intentionally violated the statute, whereas if he had complied with the statute he would have avoided the very injury that the statute was designed to minimise. Thus, the decision conforms to the analysis of statutory fault. Indeed, it has been expressly held that the reference in the section to "all practicable measures" imports a requirement of fault, since these words mean that the duty arises only in respect of dust of which the employer (or his servant acting in the course of the employment) ought to be aware.¹⁰

Sometimes the interpretation of the statute is so rigorous that it produces an affront to common sense. Thus, it has been held that the statutory duty to fence dangerous machinery is not limited to what may reasonably be required of the employer.

In *John Summers & Sons, Ltd. v. Frost*,¹¹ the House of Lords went to the limit of this interpretation by holding that the statutory duty may even compel the employer to render his machine unusable. If, as in the case of a grindstone, it is impossible to provide a guard which makes the apparatus both safe and usable, it must be made safe even though in consequence it is unusable. The absurdity of this consequence is only slightly mitigated by the qualification that the Minister of Labour has power to modify the absolute duty by making special regulations under the Act.¹² It

⁸ *Lochgelly Iron & Coal Co. v. M'Mullan* [1934] A.C. at 23. The remarks of the two Lords in this case do not mean that the word "negligence," used in a legal document such as a contract, will necessarily include a breach of statutory duty. Whether it does so depends on the interpretation of the document, which may be held to mean, by "negligence," negligence at common law. See *Murfin v. United Steel Companies, Ltd.* [1957] 1 W.L.R. 104 (C.A.).

⁹ *Gregson v. Hick Hargreaves & Co., Ltd.* [1955] 1 W.L.R. 1252, at 1266 (C.A.). See, however, *Richards v. Highway Ironfounders, Ltd.* [1957] 1 W.L.R. 781, where the employers escaped by the application of the theory of causation: they could have satisfied their statutory duty in respect of the known dust by providing a mask that would not have stopped the particles that were then unknown to exist.

¹⁰ *Richards v. Highway Ironfounders, Ltd.*, last note.

¹¹ [1955] A.C. 740.

¹² For an illustration of a qualified duty, see *Jones v. Richards* [1955] 1 W.L.R. at 455. On the question whether a regulation made under a statute impliedly supersedes the duty contained in the statute itself, see *Quinn v. Horsfall & Bockham, Ltd.* [1956] 1 W.L.R. 652 (C.A.); *Automatic Woodturning Co., Ltd. v. Stringer* [1957] 2 W.L.R. 203; 44 L.Q.R. 326.

is hard to imagine that Parliament really intended, when it passed the present Factories Act in 1937, and the previous legislation which it replaced, that so common a machine as a grindstone should become unlawful, until such time as the Minister of Labour might bethink himself to make regulations to legalise it again. The object of the Factories Act is to protect the lives and health of work-people, not to bring industry to a standstill.

This type of decision adds to the confusion of meaning involving the word "absolute." It is said that the employer's duty to fence dangerous machinery is "absolute" because it exists even though it is commercially impracticable to fence the machinery securely.¹³ This, however, is not the usual meaning of the word "absolute" in the law of tort. Generally it means a duty that exists independently of fault. In the situation just contemplated there is legal fault—namely, using an unfenced machine in defiance of the statute, as the statute is interpreted by the courts, since the employer is not allowed to show by way of defence that it is commercially necessary for him to use the machine. Such an interpretation does not necessarily involve absolute liability, in the usual legal sense of that expression.

The argument may be epitomised by saying that, up to this point, there is no need to speak of an absolute statutory duty, in the sense of liability without fault. In the cases so far discussed, although the judges may have declared the statutory duty to be absolute, the actual decisions can be analysed in terms of Lord Atkin's theory of statutory negligence, *i.e.*, an intentional or negligent failure to comply with the statutory duty. But there are some cases that can only be explained as determinations of strict (or absolute) duty in the proper sense of that expression. When a statute is thus held to create strict liability, it eliminates not only the duty issue but the issue whether the defendant was at fault.

An illustration is *Galashiels Gas Co., Ltd. v. Millar*.¹⁴ By the Factories Act, 1937, s. 22 (1), "every hoist or lift shall be . . . properly maintained," the last word being defined in effect to mean "maintained in an efficient state." It was held by the House of Lords that the section imposed an absolute duty, so that proof of any failure in the mechanism of a hoist or lift established a breach of duty, even though it was impossible to foresee the failure before the event or to explain it afterwards.

With this interpretation, the courts have passed from statutory negligence to strict statutory duty. If the previous analysis is accepted, it may perhaps be said that the evolution to strict duty was induced partly by a failure to distinguish between statutory negligence (where the legislature has supplanted the judge or jury in specifying the standard of care) and strict liability in the proper

¹³ This meaning of the term goes back to *Davies v. Thos. Owen & Co., Ltd.* [1919] 2 K.B. 39; *cf. Dennistoun v. Greenhill, Ltd.* [1944] 2 All E.R. 434.

¹⁴ [1949] A.C. 275 (H.L.(Sc.)).

sense. It may also be explained as the result of the desire of judges to give monetary compensation to a disabled workman—ignoring the fact that there exists a statutory insurance scheme designed for that purpose. The strict interpretation has been facilitated by the practice of the criminal courts in refusing to imply a requirement of fault into criminal statutes.

To explain a development is not to justify it. At present the law of industrial accidents makes little sense. Parliament has established an elaborate machinery, under the National Insurance (Industrial Injuries) Act, whereby a workman who is injured in the course of employment, whether or not by his employer's fault, can get compensation from an insurance fund. There seems to be little warrant for using the costly procedures of the law of tort to improve the insurance benefits of some workmen. Even within the field of tort itself, the statutory cause of action does not harmonise with that at common law. The opinion of the judges when they are administering the common law is that the ends of justice are best served by placing the employer under a duty of care. It is a high duty, but not an "absolute" one. If, then, the duty of the employer at common law rests on fault, why should his duty in respect of implied statutory torts be different?

Absolute liability may find some kind of justification if it diminishes litigation; but the present mode of construing the Factories Act hardly has that effect. The obvious injustice which arises in some cases when industrial legislation is construed as imposing an absolute obligation occasionally leads the courts to seek to construe the statute in such a way that it is held not to have been broken. This may mean that the issue of fault, expelled through the front door, is readmitted at the rear. Here, as elsewhere, the general effect of absolute liability is to complicate the law and to add to the difficulty of stating it.

For example, the Factories Act, 1937, s. 25 (1), provides that all floors of factories shall be properly maintained. The plaintiff stepped on a loose plate which had been fitted on the floor of the factory. The plate tipped slightly, causing the plaintiff to overbalance and fall. It was held by a county court judge there was no breach of statutory duty, since the floor was "safe" and the Court of Appeal upheld his decision.¹⁵ Here it could not be said that the floor was absolutely safe, for if it had been absolutely safe it could not have caused the plaintiff's injury. It was reasonably safe—but the court avoided speaking in terms of reasonableness, probably for fear of appearing to contradict the current dogma of absolute liability. The decision contrasts with other cases where an employer has been held to be in breach of statutory duty to fence "dangerous" machinery although the employee had brought

¹⁵ *Payne v. Weldless Steel Tube Co., Ltd.* [1956] 1 Q.B. 196 (C.A.). See also *Beadsley v. United Steel Companies, Ltd.* [1951] 1 K.B. 408 (C.A.); with which contrast *Grand Trunk Ry. v. McAlpine* [1913] A.C. 838 (P.C.).

trouble on himself by deliberately thrusting his hand into a gap in the guard.¹⁶ It seems, then, that in deciding questions of safety and danger the court will covertly consider the probability of injury as well as the degree of injury that can be expected. These are issues familiar in the law of negligence.

Other instances may be given where the draconic interpretation of industrial legislation against the employer is mitigated by holding that the employer is not in breach of duty because he has acted reasonably. In effect, these decisions admit that the employer's duty is not always absolute, but they reach the result by a purported construction of the particular regulation. Thus, it is held that a statutory duty to make the roof of a mine secure is not broken if a man sent to make the roof secure is injured by a fall of the roof. For, to comply with the statutory duty, a man must be sent to attend to the roof, and the employer cannot be held liable for doing what he must do.¹⁷ Again, a regulation contemplating that a certain operation shall continue is not construed to impose absolute liability for inevitable accidents in the course of the operation.¹⁸

It is a misnomer to speak of "absolute" liability, for legal liability is never—or hardly ever—wholly unqualified. The so-called absolute liability which is sometimes held to exist under industrial legislation is subject at least to a mitigation of damages for contributory negligence.¹⁹ Occasionally the courts take such a severe view of contributory negligence that in effect they regard it as excluding the statute altogether. Where the employer is under a statutory duty to bring about a safe condition of working, and, without any fault on the part of the employer, danger is created by the wrongful act of the plaintiff workman himself, the courts may refuse to find a breach of duty by the employer, even though the objective state of affairs required by the words of the statute has not been present at the critical moment. To reach this result sometimes requires an interpretation which in any other circumstances would seem pedantic or perverted. Alternatively, the courts may find a breach of duty, leaving the workman's contributory negligence to be considered for a reduction of damages, the reduction sometimes being assessed at 100 per cent. Space forbids the authorities on this matter to be discussed at length, but reference to the reports will show that the so-called absolute liability of an employer is never allowed to give recovery to a workman who is solely to blame.²⁰

¹⁶ e.g., *Smith v. Chesterfield Co-operative Society, Ltd.* [1953] 1 W.L.R. 370 (C.A.).

¹⁷ *Walsh v. N. C. B.* [1956] 1 Q.B. 511 (C.A.).

¹⁸ *Proctor v. Johnson & Phillips, Ltd.* [1943] K.B. 533 (C.A.).

¹⁹ *Lewis v. Denye* [1940] A.C. 921, and the Law Reform (Contributory Negligence) Act, 1945.

²⁰ See *Smith v. A. Baveystock & Co., Ltd.* [1945] 1 All E.R. 531 (C.A.); *Beadsley v. United Steel Companies, Ltd.* [1951] 1 K.B. 408 (C.A.); *Manwaring v. Billington* [1952] 2 All E.R. 747 (C.A.); *Johnson v. Croggan &*

A court desiring to exempt an employer is assisted by the rule that penal regulations are to be strictly (*i.e.*, narrowly) construed in case of genuine doubt. This rule of construction was originally laid down in prosecutions brought under statutes, but it has now been adopted by the civil courts where actions are brought for breach of statutory duty.²¹ Oddly enough, the rule has largely been abandoned in practice by the criminal courts. Yet it is still applied in civil matters so far as the *actus reus* of the wrong is concerned. However, it is for the judges themselves to decide whether the construction of the statute is sufficiently doubtful to invoke the rule. In the *Summers* case, for example (p. 237, above), an extensive interpretation was given to penal regulations.

Another way in which an employer may find relief from liability is through calling in aid the principle of *Gorris v. Scott*,²² which is merely an application of what has come to be known as the risk principle. A good example is *Bailey v. Ayr Engineering Co., Ltd.*²³ The Building Regulations require any place on the site of building operations where a person is habitually employed to be covered in such manner as to protect the workman "from being struck by any falling material or article." The plaintiff was working in an open shaft in a block of flats that were under construction, and, in breach of the Regulations, his employers had not protected him by any "umbrella." He was injured by a collapse of part of the structure itself, brought about by the negligence of servants of other contractors working on the site. It was held by the Court of Appeal that the plaintiff could not recover against his employers for breach of statutory duty, since, although they were in breach of the statutory regulations, the injury was caused by a fall of masonry which was not within the contemplation of the Regulations. Although the masonry was literally "any falling material or article" within the words of the Regulations, these words were meant to apply to things such as scaffold materials, bricks and other materials which it was intended to incorporate into the structure, and builders' débris. There were no words in the Regulations to effect this limitation expressly, but the court assumed it, partly as a matter of divination and partly by reading other parts of the Regulations.

Although the risk principle is undoubted as a principle of statutory construction, the occasions on which the courts have found it necessary to apply it in this field have been few. Almost the only

Co., Ltd. [1954] 1 W.L.R. 195. Contrast cases where some fault was found in the employer (either personally, or through a fellow servant): *Dawson v. Murex, Ltd.* [1942] 1 All E.R. 483 (C.A.); *Barcock v. Brighton Corpn.* [1949] 1 K.B. 339; *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 663; *Charles v. S. Smith & Sons (England) Ltd.* [1954] 1 W.L.R. 451; *Jenner v. Allen West & Co., Ltd.* [1959] 1 W.L.R. 554 (C.A.).

²¹ *L. & N. E. Ry. v. Berriman* [1946] A.C. 278.

²² (1874) L.R. 9 Ex. 125.

²³ [1959] 1 Q.B. 183 (C.A.). See also *Richard Thomas & Baldwins, Ltd. v. Cummings* [1955] A.C. 321.

other modern instances are a group of cases deciding that the provisions in the Factories Act requiring machinery to be securely fenced have as their principal object the prevention of workmen from coming into contact with the moving machine. From this it is deduced, applying *Gorris v. Scott*, that no cause of action generally exists under the statute if, in the absence of a fence, a piece of machinery (or of goods being processed in the machine) breaks and flies out and injures a man standing near.²⁴ But the courts have now added that the employer will be in breach of statutory duty, or of his duty at common law, if he ought to have foreseen the injury and to have provided against it.²⁵ This rider turns the issue in the "flying part" cases into one of fault.

Where the injury is of the general kind or class contemplated by the legislature the plaintiff will be able to recover for breach of statutory duty, even though the accident happened in some unusual way: *Grant v. National Coal Board*.²⁶ A distinction between the "kind" of injury and the "mode" of injury is always a fine one, and it is only by a careful choice of language that *Grant's* case can be distinguished from cases like *Bailey v. Ayr Engineering Co., Ltd.* However this may be, the fact remains that the risk principle is a means by which the issue of fault can be reintroduced into so-called absolute liability.

A statute may, of course, be worded in such a way as to let in an issue of negligence, or something like negligence. Thus, the Mines and Quarries Act, 1954, s. 157, allows the defendant to show that it was impracticable to avoid or prevent the contravention.²⁷ Some of the obligations of the Factories Act, also, are qualified by the words "so far as is reasonably practicable." It has been held that what is reasonably practicable depends on the proportion between the risk and the measures necessary to eliminate the risk,²⁸ and that the employer is not liable if he has done all that he can reasonably be expected to do.²⁹ Thus, the issue seems to be an

²⁴ One of the principal cases is *Carroll v. Andrew Barclay & Sons, Ltd.* [1948] A.C. 477. Cf. *Kilgollan's* case, next note.

²⁵ See *Carroll's* case at pp. 485, 486-487, 490, 492; *Kilgollan v. Cooke & Co., Ltd.* [1956] 1 W.L.R. 527 (C.A.), where the employer knew that many similar accidents had occurred; *Rutherford v. Glanville & Sons (Bovey Tracey) Ltd.* [1958] 1 W.L.R. 415 (C.A.).

²⁶ [1956] A.C. 649 (H.L.(Sc.)). See also *Gatehouse v. John Summers & Sons* [1953] 1 W.L.R. 743 (C.A.). A similar attitude is sometimes adopted when deciding who are within the benefit of industrial legislation: the statute may be passed primarily for the protection of persons employed in a dangerous process, and yet be construed as protecting other persons who are employed in the premises. See *Canadian Pacific Steamships, Ltd. v. Bryers* [1957] 3 W.L.R. 993 (particularly at p. 1003); *Dunn v. Bird's Eye Foods, Ltd.* [1959] 2 W.L.R. 812 (C.A.). Yet cf. *Biddle v. Truvox Engineering Co., Ltd.* [1952] 1 K.B. 101; *Herbert v. Harold Shaw, Ltd.* [1959] 2 W.L.R. 681 (C.A.).

²⁷ Cf. *Coltress Iron Co., Ltd. v. Sharp* [1938] A.C. 90 (H.L.(Sc.)), decided on the wording of earlier legislation. See, however, *Knight v. Demolition and Construction Co., Ltd.* [1953] 1 W.L.R. 981, affd. [1954] 1 W.L.R. 563 (C.A.).

²⁸ *McCarthy v. Coldair, Ltd.* [1951] 2 T.L.R. 1226 (C.A.); cf. *Riddell v. Reid* [1943] A.C. at 12 (H.L.(Sc.)); *Marshall v. Gotham Co., Ltd.* [1954] A.C. 360.

²⁹ *Thomas v. Bristol Aeroplane Co., Ltd.* [1954] 1 W.L.R. 694 (C.A.).

ordinary one of negligence, except that the burden of proving the issue is held to rest on the employer.³⁰ Similarly, if an employer's obligation to provide for the safety of his men in a given particular is limited to cases "where any danger is likely to arise," the question of likelihood is one of degree and seems to be indistinguishable from an ordinary issue of negligence.³¹ When a statute requires action within a reasonable time, it is held to operate only when the defendant knows or ought to know that the case for his intervention has arisen.³² The same interpretation attaches to the phrase "all practicable measures."³³

Some of these illustrations show that the issue of fault is allowed to make an appearance where it is introduced by the wording of the section creating the statutory duty. But the courts adopt a curiously different attitude where the statute is otherwise arranged. Suppose that one section imposes a duty, in terms absolute in the sense that there are no words referring to fault, and another section imposes a penalty but provides a defence to a criminal prosecution that the defendant used due diligence. Here the rule is that the statutory defence does not apply to a civil action for breach of the "absolute" obligation, even though the absolute obligation in tort is a judicial construction from the penal statute and does not appear from its terms.³⁴

The conclusions to be drawn from this survey of the cases seem to be two. (1) Statutory duties can be of considerable help to an injured plaintiff even on Lord Atkin's theory of "statutory negligence." (2) To go further, and construe industrial legislation as creating absolute liability, probably does not give the workman much greater protection, and it certainly leads to an effort on the part of the judges to give such legislation a narrow construction when this is necessary to avoid a result that seems to be inequitable between the parties. Moreover, there appears to be no coherent principle underlying the distribution of an employer's duties into those that are absolute and those based on the requirement of fault. The language used in legislation seems to be largely haphazard, yet it is upon the accident of language that the issue is made to turn.

Although the doctrine of absolute liability under some industrial legislation is now settled beyond recall, it does not generally apply to other statutory fields. This point will be elaborated.

³⁰ *Walter Wilson & Son, Ltd. v. Summerfield* [1956] 1 W.L.R. 1429.

³¹ *Cf. Cade v. B. T. C.* [1958] 3 W.L.R. 118 (H.L.).

³² *Simons v. Rhodes & Son, Ltd.* [1956] 1 W.L.R. 642 (C.A.).

³³ Above, p. 237.

³⁴ *Harrison v. N. C. B.* [1950] 1 K.B. at 476, 477 (C.A.); [1951] A.C. at 657-658, 664. Contrast the sounder juristic principle expressed in the American Law Institute's *Restatement of Torts, Negligence*, § 286, Comment c: "If the statute or ordinance is one which makes an act or a failure to act a criminal offence but which makes no provision for civil liability, a particular act or omission does not create civil liability unless it is of such a character or done under such circumstances as to make it criminally punishable."

II

Industrial legislation is well nigh the only area in which penal legislation has been held to create statutory torts, at any rate during the present century. Other penal statutes are subjected to a mode of interpretation which almost invariably has the effect of excluding any special remedy in tort. Yet there are exceptions that baffle any attempt to state a rule.

Occasionally the statute may be plainly inconsistent with a remedy in tort. For example, where the statute gives a civil remedy which is hedged about by restrictions, it would not be permissible to ignore the restrictions by implying an unrestricted right of action in tort.³⁵ In most instances, however, the statute merely imposes a criminal penalty without providing for a civil action of any kind. It is not generally possible to find any words in such a statute which tell either for or against the tort remedy, unless its silence is to be taken against the remedy. Nevertheless, the courts still profess to construe the statute in order to arrive at a conclusion whether the legislature intended to confer a private right of action. This process of looking for what is not there, unaided by any compelling presumptions, naturally leads to the most surprising diversity of outcome.

The diversity is both facilitated and concealed by the fact that the judges purport to be guided by contradictory rules. There is old authority, which is still sometimes cited, for saying that the presumption is in favour of a civil remedy—the civil remedy is given by implication “unless it appears from the whole purview of the Act that it was the intention of the legislature that the only remedy should be by proceeding for the fine.”³⁶ But most authorities put the rule the other way: that penal legislation does not give a civil remedy unless this positively appears. For example, in *Monk v. Warbey*³⁷ Greer L.J. said that prima facie a person who has been injured by breach of a statute has a right to recover damages from the person committing that breach unless it can be established by considering the whole of the Act that no such right was intended to be given. But later on he approved a dictum of Atkin L.J. to the effect that if the Act expressly contains a remedy for breach of it, prima facie that is the only remedy. Since Acts usually do contain some remedy for their breach, even though only a criminal one, the second rule is a large exception to the first, and makes it of little value.

It was at one time thought that the decisive question was whether the Act was passed for the benefit of a defined class of persons (or a designated individual), on the one hand, or for the public at large on the other. But here again, the decisions follow an irresolute course. The test was rejected by Atkin L.J. in

³⁵ *Chadwick v. Pioneer Private Telephone Co., Ltd.* [1941] 1 All E.R. 522.

³⁶ *Groves v. Lord Winborne* [1898] 2 Q.B. at 407 (C.A.).

³⁷ [1935] 1 K.B. 75 (C.A.).

1923,³⁸ yet it is not wholly defunct.³⁹ On the analogy of the rule for public nuisance, it might be thought that even where the Act was passed for the benefit of the public at large, a plaintiff could sue for breach of statutory duty if he suffered particular damage, over and above that suffered by the rest of the public; and this was formerly held.⁴⁰ But the later cases reject this criterion of particular damage. It is ignored, for example, in *Cutler v. Wandsworth Stadium, Ltd.*⁴¹ That case turned on the construction of the Betting and Lotteries Act, which imposed a certain obligation on occupiers of dog tracks to admit bookmakers to the track. The plaintiff was a bookmaker who was not admitted, and who sued for damages for breach of statutory duty. The action failed, it being held by the House of Lords that the Act, which in terms created only a criminal offence, was passed for the benefit of the public who resorted to the track (enabling them to choose between betting with bookmakers and betting on the totalisator), and was not intended as a "bookmakers' charter."

A decision of this kind must wear an unsatisfactory appearance, because there are no sufficient criteria for determining the intention of Parliament on a matter to which it may in fact have given no attention. The immediate purpose of the legislature was to create a criminal offence; it probably had no decided intention on the question of civil remedy. In determining whether to allow the civil remedy, the court may look at the wording of the statute and at the state of the law before the statute was passed; also, it may sometimes be induced to look at the report of a Royal Commission or other committee which proposed the legislation; but debates in Parliament are excluded. The allowable sources of information often fail to yield a positive result. Although, in the bookmaker's case, the House of Lords devoted much attention to the wording of the Act and the previous history, it cannot be said that the result of this labour indicated the decision with any clarity. It is submitted that the case can best be understood as an illustration of the general rule that an Act which in terms imposes only a criminal penalty cannot be read as giving a private right of action unless there is an indication in the statute that this was intended. The Betting and Lotteries Act certainly failed to give any such indication.

Some cases apply a special rule to public utilities. Parliament may grant powers to an undertaking in return for the provision of a public service, and the grant may be accompanied by the imposition of duties enforced by criminal penalties. There is authority for saying that the utility cannot be sued for failing to perform its

³⁸ *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K.B. at 841 (C.A.), differing from *McCardie J.* in the court below: [1923] 1 K.B. at 547.

³⁹ The "ascertainable class" test was, for example, used by *Birkett L.J.* in *Solomon v. Gertzenstein, Ltd.* [1954] 2 Q.B. 243, at 261 (C.A.).

⁴⁰ *Couch v. Steel* (1854) 3 E. & B. 402; 118 E.R. 1193.

⁴¹ [1949] A.C. 398.

statutory duty where this would result in heavy liability. In *Atkinson v. Newcastle Waterworks Co.*⁴² a water company was required by statute to keep a certain pressure of water in its pipes, under penalty of £10 if it failed to do so. Owing to the pressure being insufficient, when the plaintiff's house went on fire the fire brigade could not save it, and the house was destroyed. The plaintiff was denied a remedy against the water company, since it was unlikely that the water company, in making its "contract" with Parliament, was willing to accept such a heavy liability. Yet it has been held that where a railway company did not keep its gates closed at a level crossing when trains were not passing, and so become liable to a forty-shilling fine, the company was impliedly liable in addition to an action for damages for injuries to person or property resulting from collision with a train.⁴³ Why is the railway company not given the benefit of the "contract with Parliament" doctrine? The opposing decisions certainly cannot be reconciled by referring to the triviality of the fine imposed by the statute, in contrast with the heavy damages possible in a civil action, for the fine was even smaller in the railway case than in the water case.

Sometimes a judge will say that a particular statute does not impliedly create a civil remedy because the common law remedy is adequate⁴⁴; yet this consideration is not regarded as relevant in construing industrial legislation. There is a general duty incumbent upon an employer at common law to provide a safe system of work; but this does not prevent the court from so construing legislation as to create additional remedies for neglect of statutory safety provisions. Conversely, there is no remedy at common law against a landowner who allows his cattle to stray on the highway, thus causing an accident; a statute makes the landowner guilty of an offence, yet the courts refuse to regard the statute as supplementing the law of tort.⁴⁵

These decisions reflect no credit on our jurisprudence. The failure of the judges to develop a governing attitude means that it is almost impossible to predict, outside the decided authorities, when the courts will regard a civil duty as impliedly created. In effect the judge can do what he likes, and then select one of the conflicting principles stated by his predecessors in order to justify his decision. In practice, as already said, almost all the cases in which a civil duty has been discovered in legislation professing to be penal relate to industrial accidents.

⁴² (1877) 2 Ex.D. 441.

⁴³ See, e.g., *Fawcett v. York & N. Midland Ry.* (1851) 16 Q.B. 610; 117 E.R. 1013; see now Railways Clauses Consolidation Act, 1845, s. 47. See also *per Atkin L.J.* in *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K.B. at 842 (C.A.).

⁴⁴ *Per Atkin L.J.*, loc. cit.; *Square v. Model Farm Dairies* [1939] 1 All E.R. 259 (C.A.).

⁴⁵ *Heath's Garage, Ltd. v. Hodges* [1916] 2 K.B. 370 (C.A.); *Searle v. Wallbank* [1947] A.C. 341. Cf. *Newman v. Francis* [1953] 1 W.L.R. 402.

One of the rare instances of a statutory tort outside this field is provided by *Monk v. Warbey*,⁴⁶ where it was held to be a tort to commit the statutory offence of permitting another to drive a motor-vehicle when uninsured. It is impossible to say why the court should have felt itself able to find for the plaintiff in *Monk v. Warbey*, when in so many other cases no statutory tort has been recognised. To revert to an example already given, it is a statutory offence to allow cattle and sheep to stray about the highway; and the object of the statute was clearly to prevent the obstruction of traffic. Yet the courts hold that a motorist who is injured by colliding with cattle which are allowed to wander and lie about the highway has no remedy, under the statute or at common law. This rule is out of accord with modern conditions, and it touches the public safety even more than did the statute under consideration in *Monk v. Warbey*. It seems extraordinary that the tort right should be admitted in a somewhat complicated financial situation like that in *Monk v. Warbey*, yet denied in the comparatively simple case where a plaintiff is damaged as an immediate consequence of the defendant's breach of duty in allowing a danger on the highway.

Again, there is a code of statutory regulations issued by the Ministry of Transport known as the Motor Vehicles (Construction and Use) Regulations. These prescribe in some detail the mode of construction of motor-vehicles, the devices to be carried, and so on. It has been held that breach of the regulations does not give a private remedy to a person injured.⁴⁷ No obvious reason can be found to explain why these regulations should be interpreted differently from the safety provisions in factory legislation, but so it is.

The bias of the courts against construing a tort remedy from a penal statute is illustrated in a different way. Where A makes a contract or agreement with B, and a statutory duty is imposed on A as to the way in which he performs his side of the agreement, the courts generally hold either that the statute does not give any private right of action to the person for whose benefit it was passed, or that the right of action is confined to B, who is the other party to the agreement. On the latter construction, the tort remedy does not extend to members of B's family who may be injured by A's breach of statutory duty—for instance, by A's provision of impure domestic water,⁴⁸ or of diseased milk.⁴⁹ This interpretation was applied to the duty established by the Housing Acts to

⁴⁶ [1935] 1 K.B. 75 (C.A.).

⁴⁷ *Phillips v. Britannia Hygienic Laundry Co., Ltd.* [1923] 2 K.B. 832 (C.A.); *Stennett v. Hancock* [1939] 2 All E.R. 578; *Barkway v. South Wales Transport Co.* [1950] 1 All E.R. 392 (H.L.); cf. *Clarke v. Brims* [1947] K.B. 497 (failure of rear-light). See also *Newman v. Francis* [1953] 1 W.L.R. 402 (by-law requiring dogs to be kept under control).

⁴⁸ *Read v. Croydon Corpn.* [1938] 4 All E.R. 631.

⁴⁹ *Square v. Model Farm Dairies* [1938] 1 All E.R. 259 (C.A.).

repair houses of low rental⁵⁰; but the Occupiers' Liability Act changes the position and makes the landlord liable even to third parties.⁵¹

A statute will, however, be allowed to assist a plaintiff who is injured by the dangerous condition of premises. In the case of public property, it is sometimes difficult to identify the body responsible in law for maintaining the premises; but the plaintiff may be helped by a statute which imposes the duty to maintain upon a specified body. In such circumstances he may sue the specified body for breach of its statutory duty.⁵² This statutory duty is, of course, no more than the ordinary duty of those who occupy or control property, applied to a specific body of persons by Act of Parliament.

Apart from this type of case, and outside the field of industrial accidents, the general trend may be summed up by saying that there is a judicial bias against the construction of penal statutes to create torts. *Monk v. Warbey* stands almost alone as a modern instance of the contrary mode of interpretation.

This desire to curtail the impact of statutory duties upon the law of tort is in part a reflection of the rule of absolute statutory liability for industrial accidents. When statutory liability is taken to imply liability without fault, the judges tend to deny that statutory liability exists on the facts before them—provided that they are not considering an industrial accident. This seems to indicate that the judges are themselves doubtful about the wisdom of their juristic invention. For example, if the sale of diseased milk were regarded as a breach of statutory duty actionable by anyone who might drink the milk, the result would be to impose strict liability in tort upon the retailer, who might have no means of knowing that the milk he was selling was unfit for consumption. The courts take the view that the consumer of the milk is sufficiently protected (outside of contract) by his action at common law against the producer, who is likely to have been in breach of his duty of care as manufacturer. Similarly, if the Motor Vehicles (Construction and Use) Regulations were held to create statutory torts, the result of the "absolute" construction would be that the driver of a car would be liable for dangerous defects of which he could not possibly have known.⁵³ That the courts refuse to reach this result is satisfactory. It would not, however, be satisfactory to say that the Regulations are wholly irrelevant in tort. If an owner has driven a car which fails to conform with the standards of safety

⁵⁰ *Ryall v. Kidwell & Son* [1914] 3 K.B. 135.

⁵¹ Occupiers' Liability Act, 1957, s. 4 (7).

⁵² *Ching v. Surrey C. C.* [1910] 1 K.B. 736 (C.A.); *Abbott v. Isham* (1920) 90 L.J.K.B. 309; *Griffiths v. Smith* [1941] A.C. 170 (see particularly at pp. 203-204).

⁵³ See *Phillips v. Britannia Hygienic Laundry Co.* [1923] 2 K.B. at 842, where Atkin L.J. used this as an argument against holding that regulations of this type created statutory torts.

imposed by the Regulations, the breach of the Regulations, if itself intentional or negligent, should at least be evidence of negligence, and we shall see that there is authority to support this type of argument.

An even more important comment upon the prevailing judicial theory is that the judges are mistaken in assuming that statutory torts necessarily involve absolute liability. It seems safe to say that outside the field of industrial legislation they do not generally do so. Thus, Lord Wright quoted judicial authority for the principle (expressed in a case which did not concern industrial legislation) that where statutory words are capable of meaning either that an absolute duty is imposed or that the duty is only to exercise due and reasonable care, the latter meaning is to be preferred, since the absolute duty cannot be held to be imposed save by clear words.⁵⁴

III

Such, then, is the present state of the law relating to statutory torts, as it appears from current cases. An attempt will be made to suggest a more fruitful line of approach to the problem of introducing statutory duties into the law of tort.

During the nineteenth century there was clear authority for a useful rule of evidence. Although it has largely dropped out of sight in this country, it is still actively recognised in some of the United States, and there can hardly be any doubt that it would again be upheld if argued here. It is to the effect that where the defendant is under a duty of care towards the plaintiff at common law, his breach of statutory duty (the statute being directed to the same end as the common-law duty) is evidence of negligence.

Thus, in *Blamires v. Lancs. & Yorks. Ry.* (1873),⁵⁵ the plaintiff was injured in a railway accident which might have been prevented if the company had complied with its statutory duty of providing a communication cord. It was held by the Court of Exchequer Chamber that the company was liable for the plaintiff's injuries. Of the judges who delivered reasoned opinions, Blackburn J. appeared to hold that the plaintiff had an action for breach of statutory duty, but Brett and Grove JJ. preferred to base their judgment on the ground that the plaintiff had an ordinary action of negligence, the breach of the statute being evidence of negligence.

⁵⁴ *Northwestern Utilities v. London Guarantee and Accident Co.* [1936] A.C. at 120-121 (P.C.). Cf. *Lambert v. Lowestoft Corpn.* [1901] 1 Q.B. 590; *Blundy, Clark & Co. v. L. N. E. Ry.* [1931] 2 K.B. at 345 (C.A.); *Read v. Croydon Corpn.* [1938] 4 All E.R. at 651. The tort created by the decision in *Monk v. Warbey* seems to be as anomalous in this respect as in others, for it appears from *Houston v. Buchanan* [1940] 2 All E.R. 179; 1940 S.C.(H.L.) 17, that a person may be responsible for the statutory offence of permitting although he does not know that the driver is uninsured. The interpretation appears to be more severe than that adopted in the criminal law, where offences of permitting require knowledge.

⁵⁵ L.R. 8 Ex. 283 (Ex.Ch.).

Brett J. said: "It is right to use the Act as some evidence of what is due and ordinary care under the circumstances of this case; it is some evidence that it is a proper protection that means of communication should exist between the passengers and the guard. But also there is evidence that not only was this precaution enacted, but that it was in fact a habit with railway companies to carry the enactment into effect. And taking into consideration these two facts, they together amount to evidence on which the jury were entitled to find that something was not done which railway companies of ordinary care would do." Similarly, Grove J. said: "Supposing that, instead of an Act of Parliament, the Board of Trade had issued a notice to all railway companies pressing upon them the adoption of this precaution, that evidence could not have been withheld from the jury; it would show that the company had been warned of an efficient means of preventing accidents. Thus, the Act is important evidence, as showing, not merely that the means existed, but that it was known, and was sanctioned by the legislature."

The rule that breach of statute is evidence of negligence passes naturally to the proposition that a statute may yield a standard of care which is applicable even to cases to which it does not in terms apply. For example, the anxiety of the legislature that an employer shall provide all proper guards and fences has now communicated itself to the judges, so that an employer who complies with his statutory duty may still be held liable at common law if he fails to exhort or direct his workpeople to use the safety instruments provided. If, then, a workman removes a guard because it is quicker to work without it, this will be contributory negligence resulting in a reduction of damages; but still the injured workman may be given some damages—perhaps 50 per cent. or more of what he would otherwise have got—on the ground that the employer has not sufficiently sought to persuade him to take care for his own safety.⁵⁶ The same rule is applied in respect of the employer's statutory duty to provide goggles.

These illustrations show how statutory standards can be naturally and thoroughly assimilated into the law. Had it not been for the legislation requiring goggles to be provided where work involves danger to the eyes, it is possible that the judges would not have imposed the duty of providing goggles upon the employer. Goggles are an inexpensive item of personal wear, and it might have been thought that the employee could provide them for himself. But since the legislature has settled that the provision of goggles is for the employer, the judges have added the rider that the employer must exhort their use. The statutory duty has affected the standard of care at common law.

⁵⁶ The main cases are mentioned in *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] 2 W.L.R. 510, where, however, it was held that the workman was so experienced that he needed no warning.

There are other ways in which a statute may serve as a guide to proper behaviour in circumstances falling outside its expressed scope. The existence of a safety provision in a statute may indicate to a reasonable employer the possibility of a particular kind of injury to his workman, and, if so, he may be obliged at common law to take means to avoid that injury which are not mentioned in the statute.⁵⁷ Indeed, there are cases where regulations inapplicable to the particular defendant⁵⁸ or the particular plaintiff⁵⁹ are held to have created a standard of care to which the defendant should have moulded his conduct.

Reverting to the situation where the statutory duty is actually broken, the next question is whether the "evidence of negligence" rule is a sufficiently strong legal formulation of the issue. There is authority for saying that it is not.

Cayzer, Irvine & Co. v. Carran Co. (1884)⁶⁰ was an action for collision damage in which the plaintiff complained of a breach of the Thames Rules. These statutory rules of navigation were sanctioned by a penalty but gave no express right of action for breach.⁶¹ In the House of Lords, Lord Blackburn said: "Where anyone transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not partly the cause of the accident, may recover both in law and in admiralty."

It will be noticed that Lord Blackburn goes somewhat beyond the proposition that the statutory duty, coupled with observance by others, is evidence of negligence. His words are consistent with the view that the breach of statutory duty can itself be taken as negligence. This stronger way of looking at the matter is also

⁵⁷ But where the danger is obvious, the way in which the particular statute sought to meet it is not relevant to the question whether the employer has been in breach of his duty at common law: *Chipchase v. British Titan Products, Ltd.* [1956] 1 Q.B. 545. It has occasionally been thought that compliance with a statute is a fact to be considered in assessing whether a reasonable employer would think it necessary to go farther (*Quinn v. Horsfall & Bickham, Ltd.* [1956] 1 W.L.R. 652 (C.A.)), and similarly that absence of provision on a particular point in safety regulations is some evidence that it is not careless to fail to make that provision: *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] 2 W.L.R. at 516. Somervell L.J. said: "If an Act or regulation has prescribed in detail a system of work for a particular type of operation, it is difficult, though not legally impossible, to establish that an employer who has carried out the statutory provision has failed, for example, to have a reasonably safe system": *England v. N. C. B.* [1953] 1 Q.B. at 731-732 (C.A.).

⁵⁸ *Thomas Stone Shipping, Ltd. v. Admiralty* [1953] P. 117 (C.A.) held that although regulations did not apply to a vessel belonging to the Crown, they should be taken to contain a standard of care to which the vessel should have conformed.

⁵⁹ *Hartley v. Mayoh & Co.* [1954] 1 Q.B. 394 (C.A.), per Jenkins L.J.

⁶⁰ L.R. 9 App.Cas. 873, at 880-881.

⁶¹ The rules are set out in 5 P.D. 276.

legally the sounder. By hypothesis, the defendant is under a duty of care at common law not to damage the plaintiff by negligent navigation. By hypothesis, the statutory rule has been made in order to clarify the requirements of good seamanship and to prevent the particular kind of mischief against which the common law duty is itself directed. By hypothesis, too, this very mischief happens. In such circumstances, it is too weak to say that the breach of statute is merely "evidence" of negligence. Such a statement would imply that the jury or judge could legitimately hold that the defendant as a reasonable man was not negligent on the facts, notwithstanding that he deliberately broke the statute. But how can this be? The legislature has laid down a particular line of conduct for the very purpose of avoiding this mischief. It cannot be regarded as the mark of a reasonable man to ignore the statutory rules.

In the action of negligence, someone has to set the standard of care and foresight by which the defendant is to be measured. In ordinary cases this standard is set by the judge or jury. But where a safety rule has been enacted, the standard is authoritatively set by the legislature. It is then no longer open to the defendant to assert, or to the court to find, that the defendant could not have foreseen the mischief. For the legislature has foreseen it, and has laid down the conduct that is required for minimising it.

To take another illustration: Parliament has enacted a speed limit of thirty miles per hour in built-up areas. Can it be open to the reasonable man who supplies the standard test of negligence to judge that in a particular street a speed of, say, forty miles per hour is safe? To admit this would allow the reasonable man to be wiser than the law.

This type of argument against the "evidence of negligence" rule was first influentially put forward by Thayer, in an article which caused a number of American states to abandon that rule in favour of the "negligence *per se*" rule.⁶² The latter rule may be stated as follows. Where the defendant is under a common-law duty of care to the plaintiff in a particular respect, and he violates a statute designed to prevent the particular mischief in respect to which he is under the duty at common law, and the mischief eventuates, the defendant's violation of the statute is a negligent breach of the duty of care as so "concretised" by the statute, irrespective of the question whether a legislative intent can be found to give an action for breach of statutory duty. Or, as the American Law Institute's *Restatement* puts it, "by prohibiting a particular act for the purpose of protecting the interests of some person or class of persons as individuals, the legislative body declares its opinion that the risk involved therein is unreasonable."⁶³ This rule may be called the principle of statutory concretisation—or, if

⁶² Thayer, "Public Wrong and Private Action" (1914) 27 H.L.R. 317.

⁶³ Torts, Negligence, § 285, Comment *h*.

that word be objected to, the statutory formulation—of the standard of care.

Even though the rule has not yet been explicitly stated by the English judges, it may perhaps be perceived to underlie the decisions. Where a statute implements a common-law duty of care, the practice of the courts is, indeed, to allow an action. In *Solomons v. R. Gertzenstein, Ltd.*⁶⁴ a question arose that was closely similar in principle to that in *Blamires v. Lancs. & Yorks. Ry.*, above. The occupier of a building, in breach of statute, failed to provide a fire escape. A fire broke out without his negligence, and the plaintiff, an employee on the premises, was injured (as was alleged) through lack of means of escape. The decision turned upon a point not here relevant, but two members of the Court of Appeal expressed the opinion that an occupier who was in breach of statutory duty under such legislation would be liable in damages to a plaintiff injured in the circumstances of such a case. It is true that the Lords Justices who expressed this opinion thought it necessary to find in the penal statute an intention to benefit of the plaintiff. Their opinion was that, the duty being imposed for the benefit of a particular ascertainable class, namely, the persons in the building, one of such persons has a right of action for breach of statutory duty. But this divination of legislative intent, when in truth the question was not present to the mind of the legislature, inevitably bears the appearance of fiction. Would it not be more satisfactory to say that the legislature has here clarified the ordinary duty of the defendant as an occupier?⁶⁵ Even if this rule is rejected, the "evidence of negligence" rule, for which there is good authority, will achieve converging results in the great majority of situations.⁶⁶

If the concretisation theory is accepted, it invites reconsideration of certain assumptions concerning the present law. The decisions to the effect that the Motor Vehicles (Construction and Use) Regulations do not give rise to civil actions become suspect.

⁶⁴ [1954] 2 Q.B. 243 (C.A.).

⁶⁵ Cf. Harper and James, *The Law of Torts* (Boston, 1956), ii, 995: "In most cases it is carrying construction pretty far to read provisions for a civil liability into a statute which actually omits them while expressly providing for criminal punishment, especially when it is such an easy and familiar thing to insert civil recovery provisions where they are wanted. Professor Thayer pointed this out decisively in his classical article on the subject, and modern cases in this country make little use of the discredited reasoning. But it is still fashionable in England to pursue the will-o'-the-wisp of a non-existent legislative intention."

⁶⁶ There are exceptional cases where the "evidence of negligence" rule gives a preferable result. Recently the Supreme Court of Texas had to consider a case where an eight-year-old boy started to push his bicycle across an expressway, in violation of a statute which forbade crossing at that point, and also forbade the use of bicycles on the expressway. It was held that the child's violation of the statute was not sufficient to establish negligence on his part; thus the court, in effect, ignored the statutory standard in judging a child. In the case of an adult, the statutory standard would have been applied to establish negligence. The case is *Rudes v. Gottschalk* (1959) 324 S.W. 2d 201.

In all the cases on this question (above, n. 47), it is assumed that an action for breach of statutory duty under these Regulations, if allowed, would result in absolute liability. Putting this issue aside, and granting that the Regulations do not create absolute liability in tort, they should surely be relevant in an action of negligence at common law. Suppose that a regulation is made requiring a certain class of vehicles to carry two tail lamps in place of the previous single lamp, or to double the size of the tail lamps previously required. Neglect to comply with such a regulation should be held to be negligence giving rise to a liability in damages for a resulting accident. Immediately the regulation is made, it becomes unreasonable to do something that might have been reasonable previously. Similarly with regulations governing hygiene in the preparation of food: they do not create absolute liability, but that is no reason for denying them an effect in the action of negligence.

To speak of the statutory "concretisation" of the duty at common law may frequently be an understatement, for the statute may push the duty further than it would otherwise extend. Indeed, the statute is not of much utility to the plaintiff unless it goes beyond the common law. The various duties imposed by industrial legislation sometimes fall short of the duty at common law, as that is now interpreted, but often they go further. The fact that the statute somewhat extends the duty is no reason for ignoring it in an action of negligence.

If this principle were recognised, it would hardly be possible to arrive at the result reached in *Biddle v. Truvox Engineering Co., Ltd.*⁶⁷ By section 17 (2) of the Factories Act, 1937, the vendor of a machine that is inadequately guarded is guilty of an offence. Finnmore J. held, nevertheless, that the manufacturer was not liable for breach of statutory duty. Apply to such facts the theory of statutory concretisation. Under the rule in *Donoghue v. Stevenson*,⁶⁸ a manufacturer is under a duty of care to see that his products are safe, but the duty would not generally be violated merely because he has omitted to include in his product some device to protect the purchaser against the consequences of inattention or folly. However, the provision in the Factories Act could well be regarded as extending the standard of behaviour exacted from manufacturers under the rule in *Donoghue v. Stevenson*, and so as giving an action of negligence.⁶⁹

It is sometimes thought that the concretisation theory carries the danger of hardship, because (1) violation of a statute may be

⁶⁷ [1952] 1 K.B. 101.

⁶⁸ [1932] A.C. 562 (H.L.(Sc.)).

⁶⁹ Quite apart from this argument, the decision in *Biddle's* case does not harmonise with the general attitude adopted in industrial cases. For example, this legislation is regarded as imposing tort responsibilities upon contractors who would not otherwise be under a duty of care. See *Canadian Pacific Steamships, Ltd. v. Bryers* [1958] A.C. 485.

justified by necessity, and (2) some anachronistic penal legislation exists unrepealed but unenforced: to give it an automatic application in tort would therefore be unjust.⁷⁰ As to (1), it may be replied that the circumstances of necessity could be admitted as a defence to the charge of breach of statutory duty both civilly and criminally.⁷¹ As to (2), it might be possible to develop a doctrine of the obsolescence of statutes when assessing negligence in civil cases, but the point has not arisen. Indeed, I cannot think of any antiquated legislation in England that would cause trouble in this connection. The Sunday Observance laws come to mind, but they could be regarded as irrelevant in a tort action, by virtue of the standard theory of causation and the risk principle.

Integration of statutory duties with the action of negligence would clarify the way in which the decision in the well-known case of *Gorris v. Scott*⁷² ties in with the risk principle. The defendant in *Gorris v. Scott* was under a duty of care as bailee with respect to the cattle he was carrying, and the statutory duty rendered this general duty of care more specific with regard to situations within the risk contemplated by the statute. But since the harm that occurred was not within the contemplation of the statute, the defendant was not guilty of statutory negligence with regard to it.

It may be thought that some remarks of Lord Wright in the pedestrian crossing case, *L. P. T. B. v. Upson*,⁷³ are against the view of the law here suggested. Lord Wright distinguished sharply between the action of negligence at common law and the action for breach of statutory duty. He thought that the latter created absolute liability, apparently forgetting his own remarks to the contrary fifteen years earlier (above, p. 236). Lord Wright's principal object was to assert that a plaintiff who relies on a statute must plead it. Yet it is difficult to reconcile this opinion (which was not the *ratio decidendi* of the case) with the abolition of the forms of action and with the rule that a party is not required to plead matters of law. In the bad old days a plaintiff had to select his form of action at the beginning. The improvement effected by the Judicature Act is supposed to be that a plaintiff merely has to plead the facts; he may then leave it to the court to say what is his proper remedy on those facts. The new system would differ little from the old if the plaintiff were required to plead not only

⁷⁰ These are the principal criticisms of Thayer's article by Professor Clarence Morris in 46 H.L.R. 453. He advances the further argument that a statute may create liability without fault, where the defendant has made an innocent mistake of fact, whereas tort liability should normally rest on fault. Admitting the premises, it may be replied that the concretisation theory operates only in an action of negligence when the defendant's conduct is shown to have been intentional or negligent as to the breach of statute. It does not, therefore, require or justify strict liability. See Morris's restatement of his position in 49 Col.L.R. 21.

⁷¹ Cf. *Restatement, Torts*, § 286, Comment c.

⁷² (1874) L.R. 9 Ex. 125.

⁷³ [1949] A.C. at 168-169.

the facts but the torts which he thinks have been committed against him.⁷⁴

It must now be accepted that there exists, in some circumstances, an action for breach of absolute statutory duty, which is distinct from the action of negligence. But this does not mean that statutes are irrelevant to the action of negligence, and it cannot be supposed that a plaintiff who brings an ordinary action of negligence must plead statutes bearing on the standard of care to be required of the defendant.

It should be noticed that the principle of statutory concretisation, even if it comes to be accepted by the English courts more clearly than it now is, has no application to statutes which operate outside the duty of care at common law. Where the defendant is not under a duty of care at common law, the passing of a penal statute should not automatically be held to place him under a civil duty. The compelling reason is that liability in tort may be far more onerous than the criminal penalty specified in the statute. For one thing, the damages in tort may greatly exceed the penalty thought appropriate by the legislature. Again, the damages in tort follow inexorably from a decision of liability, whereas a criminal court has power to reduce or remit the penalty according to the degree of the defendant's wrongdoing.

Besides this, the silence of the statute on the civil issue is an argument against civil liability. Judges sometimes plead with parliamentary draftsmen to be specific on the question whether the statute is to affect the law of tort⁷⁵; but why should the draftsman say what he does *not* intend the measure to do? If the statute is intended to create a new type of private right, one would expect it to say so.

To illustrate: in the waterworks case referred to on p. 246, the defendant water company was not under a duty of care at common law to maintain sufficient water pressure to extinguish fires, for such a duty of positive action could be created only by contract or statute passed for that purpose. It was, therefore, reasonable to hold that the breach of a penal statute could not create a private right in the plaintiff in the absence of a statutory intent to this effect. But in the level crossing cases referred to on the same page, the railway company was under an activity duty at common law in running its trains, and the statute concretised that duty by precise regulation for railway crossing gates. It is not surprising, therefore, that the breach of statute was held relevant to the company's liability in tort. It will be seen that the theory of statutory concretisation explains a distinction in the case law which otherwise must appear arbitrary.

⁷⁴ Perhaps an authority against Lord Wright's opinion on the rule of pleading is *Lewis v. Denye* [1940] A.C. at 924-925.

⁷⁵ e.g., *Lord du Parc* in [1949] A.C. at 410.

Again, the distinction explains *Heath's Garage v. Hodges*, relating to cattle on the highway (above, p. 246). At common law a farmer is under no duty to prevent his cattle from straying on the highway; consequently, the statute which penalises him for allowing his cattle to stray in this way operates outside the established area of duty, and does not make a case of statutory negligence.

The theory of statutory concretisation does not support the decision in *Monk v. Warbey* (p. 247, above). At common law, a person who lent another a vehicle was under no duty of care to see that the driver was insured. This duty was created only by the penal statute, which showed no intention to create private rights. The decision in *Monk v. Warbey* was an isolated assumption of legislative power by the courts.

An opinion contrary to the one here propounded has been expressed by Professor Clarence Morris.⁷⁶ In his view, when a criminal statute is passed outside the area of common-law duty, the question whether a civil action should be allowed under it should depend frankly on the policy of the case as viewed by the court. For example, in the bookmaker's case (above, p. 245), the court would have had to decide whether sound policy required bookmakers to be given an action for damages for being refused admittance to the course, notwithstanding that the legislature had refrained from pronouncing on the question. Perhaps American legal opinion is prepared to give judges a freer hand than is generally conceded in England; at all events, it seems to me that this proposal confuses the judicial and legislative functions. The judge makes law interstitially, and this is an almost inevitable part of his function; but it would be anachronistic to leave the creation of new areas of law or new classes of private rights to the hazards of litigation.

The theory of statutory concretisation may cause practical difficulty in determining one type of case: where the defendant is under a duty of care at common law, but the duty at common law is satisfied by a somewhat perfunctory performance. Take the ordinary retailer of goods—that is to say, a seller who is not the manufacturer. He is undoubtedly under some duty of care, since he would be liable for failing to reveal to the purchaser a latent danger in the article of which he actually knows.⁷⁷ On the other hand, he need not make an examination of an article which he has no reason to suspect is dangerous; he need not overhaul and repair a vehicle or other machine which he is selling as second-hand; and he need not point out dangers that are obviously inherent in the use of the thing sold. Now consider some of the penal legislation

⁷⁶ "The Role of Criminal Statutes in Negligence Actions" (1949) 49 Col.L.Rev. 21.

⁷⁷ *Clarke v. Army & Navy Co-operative Society, Ltd.* [1903] 1 K.B. 155 (C.A.).

applicable to sellers. Regulations made under the Heating Appliances (Fireguards) Act, 1952, penalise sellers of certain heating appliances, such as electric fires, if they are sold without guards. These provisions apply not only to the manufacturer but to the retailer. Is a retailer who sells a fire without a guard liable to a child who is burnt for want of the guard? Again, the Road Traffic Act, 1934, s. 8 (1), makes it an offence to sell a motor-vehicle for delivery in such a condition that its use on the road would be unlawful. Suppose that a second-hand car is sold with defective brakes; is the seller liable for breach of statutory duty, or else for negligence eked out by the statute? In *Badham v. Lambs, Ltd.*,⁷⁸ du Parc L.J., sitting as an additional judge of the King's Bench Division, held that the section gave no right of action to the purchaser of the car. It seems, however, that the purchaser in the case before him was merely complaining of having had a bad bargain, so that the remedy claimed was by way of what may be called a statutory contract rather than in tort. Suppose that the purchaser had been injured in an accident caused by the defective brakes as he was driving the car away? Although the question is a difficult one, it may be suggested that he should then have been allowed an action in tort. In other words, statutory duties imposed upon sellers could and should be implemented via the action of negligence.⁷⁹

After this rather long discussion, it may be helpful to state the outcome as succinctly as possible.

(1) Industrial legislation is almost always construed to create statutory torts by implication, and such torts involve absolute liability unless a contrary intent can be found in the statute.

(2) Breach of other penal legislation may be used as evidence of negligence where there is a duty of care at common law. It is submitted that the courts may go further and say that such a breach, if itself intentional or negligent, not merely is evidence of negligence but *is* negligence, and so makes the culprit liable for consequential damage which it was the aim of the legislation to prevent. In other words, when the legislature has enacted a safety measure, the defendant is not allowed to say that he reasonably thought the safety measure to be unnecessary. This is not absolute liability but merely statutory negligence.

⁷⁸ [1946] K.B. 45.

⁷⁹ This position has been reached in the United States. In *Tamiami Trail Gun Shop v. Klein* (1959) 109 S. 2d 189, a statute made it an offence to sell weapons to minors; the defendant sold a rifle to the infant plaintiff in breach of the statute, and the plaintiff injured himself with it. A Florida court allowed the plaintiff to recover damages. Query, however, whether the purpose of the statute was not to prevent juvenile delinquency, rather than to prevent minors exposing themselves to danger. A question like this must often be a matter of speculation, if debates in the legislative chamber are not looked at.

The decisions of American courts are not of much assistance for my general thesis, because they have, in my opinion, gone too far in allowing penal statutes to create by implication new heads of duty.

(3) Where there is no duty of care at common law, breach of non-industrial penal legislation does not affect civil liability, unless an intention to affect civil liability can be found in the statute. An example of such statutory intent is provided by the Coal Mines Act, 1911. Most of this Act is drafted in terms of criminal penalties, but section 102 (8) tells us that the owner of a mine is not to be liable in damages for a breach of statutory duty under the Act if it was not reasonably practicable to avoid or prevent the breach. From this casual indication we are left to gather that the Act is intended to operate in the field of tort as well as in the field of crime, and so the courts have held. (A similar provision appears in the Act now in force, the Mines and Quarries Act, 1954, s. 157.) It is submitted that, in the absence of some such words in a statute, provisions which are primarily penal in character should not be held to extend the range of civil duties. *Monk v. Warbey*, which uses penal legislation to found a new type of civil claim, without words in the statute to justify it, should be regarded as an improper type of judicial invention.

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ON THE VALIDITY OF JUDICIAL DECISIONS IN THE NAZI ERA

THE recent controversy between H. L. A. Hart and Lon L. Fuller on the relationship of law and morals has attracted a considerable amount of interest.¹ No doubt some of this is due to the distinction of the contestants as well as to the illustrious arena of the contest; and there is no need to emphasise the intrinsic significance of the issue. At the same time, it would appear fair to ascribe the particular attraction of the controversy to the fact that it centres round a concrete situation in recent history, *i.e.*, the breakdown of traditional order and morality in Germany during the Nazi era. Hart argued, *inter alia*, that courts have no alternative but to apply a properly enacted statute however evil its aims may be. A victim of such law may rebel on moral grounds but, legally speaking, he has no case; he must, at his own risk, choose between his (legal) duty to obey the law and his (moral) duty not to do or abet evil. Fuller, on the other hand, emphasised that the incorporation of evil aims in law results in removing its very foundation, namely, the claim to command fidelity to law. Law, considered merely as order, contains its own implicit morality as part of its connotation. "When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law."²

Hart's argument in favour of legal positivism as well as Fuller's case for the moral character of law both invoke Radbruch's legal thought as well as a German criminal court decision dealing with the validity of a Nazi statute. While I do not wish to deal with Radbruch's views in this paper, the drift of his argument may be recalled in a few words. Radbruch,³ with Lask and Max Weber, was the leading representative of "relativism" in German legal thought which, for the sake of simplicity, will be equated here with legal positivism. According to his opinion the validity of law is

¹ H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 Harv. L.R. (1958), 593-629; Lon L. Fuller, "Positivism and Fidelity to Law," *ibid.* 630-673.

² *Op. cit.* 660.

³ See *Legal Philosophies of Lask, Radbruch, and Dabin*, Twentieth-Century Legal Philosophy Series, Vol. IV, 1950.

not affected by the question whether its aims are in conformity with morality or not. After the late war Radbruch qualified his views to the extent that "the incompatibility of positive law with justice" may "reach such an intolerable degree that law becomes 'non-law,' and has to yield to (the postulate of) justice."⁴ It is, to me, doubtful whether this attitude represents an elucidation of his previous views or a recantation, as has generally been assumed. However, Radbruch's views have had a bearing on recent German judicial decisions dealing with the alleged invalidity of certain Nazi legal and administrative enactments.

I

One of these court cases has been chosen by Hart and Fuller as a peg on which to hang their arguments. It would have been possible (and not objectionable) to construct a fictitious case for the sake of argument. However, it is difficult to invest such a model with the complexity and with the telling flesh and blood character of an actual historical situation. It was therefore appropriate to illustrate the problem by means of a decision by the German judiciary whose members, in the post-war period, were faced with a marginal situation; *i.e.*, a situation in which ultimate questions of law had to be reviewed after a radical upheaval of the political and legal tradition. In the circumstances, the actual facts of the case must be considered relevant, and so must be a correct appreciation of the legal position in Germany at the time under review. Moreover, it would appear essential that a typical case decided at the highest level should have been chosen as an illustration. It is doubtful whether these requirements have been satisfactorily fulfilled in the Hart-Fuller controversy.

The decision chosen by Hart for discussion was one of the earlier court decisions to apply German criminal law to an alleged felony committed in the Nazi era. It is a decision by a provincial court of appeal which, it may be conjectured, owes the privilege of jurisprudential scrutiny primarily to the fact that it was reported (and commented on) in the *Harvard Law Review* in 1951,⁵ as well as being mentioned in Friedmann's *Legal Theory*.⁶ The facts underlying the case were, according to the *Harvard Law Review*, as follows:

"In 1944, defendant, desiring to get rid of her husband, reported to the authorities derogatory remarks he has made about Hitler while home on leave from the German army. Defendant wife having testified against him, the husband was sentenced to death by a military tribunal apparently pursuant to statutes making it illegal to assert or repeat any statements inimical to the welfare of the Third Reich. . . . However, after serving

⁴ *Rechtsphilosophie* (4th ed., 1950), 353. Hart does not do full justice to Radbruch who kept emphasising the priority of positive law.

⁵ 64 Harv.L.R. (1951), 1005-1007.

⁶ 3rd ed., 1953, p. 457, note 21.

some time in prison, the husband was sent to the front. Following the defeat of the Nazi régime, the wife, as well as the judge who had sentenced her husband, was indicted under § 239 of the German Criminal Code of 1871, for the unlawful deprivation of another's liberty ('*rechtswidrige Freiheitsberaubung*'). On appeal to a German Court of last resort in criminal cases, held, that the sentencing judge should be acquitted, but that the wife is guilty since she utilised out of free choice a Nazi 'law' which is contrary 'to the sound conscience and sense of justice of all decent human beings' to bring about the death or imprisonment of her husband."⁷

The Harvard reviewer considered that the decision presented (a) an undesirable threat to the stability of law in Germany. "... the German people, in fashioning their conduct, may consider the possibility that a subsequent régime might again declare as 'unlawful' any action taken in accordance with the commands of the present government"; (b) the desirable effect of restoring certain minimum standards of human decency—provided that rigorous standards could be maintained concerning what constitutes criminal guilt; (c) a violation of the principle of *nulla poena sine lege*. "The primary objection of *ex post facto* effect . . . is also applicable to the instant decision."

Hart bases his reasoning upon the bare facts of the case and assumes throughout that the Nazi statute was unquestionably law and that the procedure, under which the husband was sentenced to death, was legally unobjectionable. Fuller questions whether the Nazi state was a "*Rechtsstaat*," whether, in particular, the criminal statute under review was properly promulgated, and whether it was correctly interpreted in court practice under the Nazis. It is open to argument, in the circumstances, how much of the ideological disagreement between Hart and Fuller follows from their discrepant appreciation of the facts.

However, it would certainly appear to be useful first to have a closer look at how the question of the validity of Nazi enactments has actually been handled by German courts at the highest level. The decision discussed by Hart and Fuller was of a rather tentative character, being one of the first to apply German law to such a situation. Moreover, it was, as mentioned, the decision of a provincial court with minor bearing as a precedent upon German judicature as a whole. This is particularly regrettable as only two years later the Federal Supreme Court decided a parallel case in which it gave detailed reasons for its decision. Both the Federal Supreme Court and the Federal Constitutional Court have pronounced repeatedly on the questions under review, and it needs no emphasis that these decisions must decisively bear upon the issue.

The point could be made that even the decision of a minor court could still be typical of the judicial climate in general and therefore

⁷ *Loc. cit.* 1006.

suitable as a paradigm. To cap misfortune, however, the *Harvard Law Review* essentially misreported the case, and it appears to be on this report that Hart's account and appreciation of the case were based.⁸ Hart feels that "unqualified satisfaction with this result seems to me to be hysteria. . . . This (result) was secured only by declaring a statute established since 1934 not to have the force of law, and at best the wisdom of this course must be doubted."⁹

The relevant facts were actually as follows: The provincial court of appeal, setting aside the acquittal of the accused wife, did *not* hold the Nazi statutes of 1934 and 1938 to be invalid. The court held the statutes to be "highly iniquitous laws which, especially because of their severe penalties (which offered the possibility of cruel punishment in the particular case), were considered to be terror laws by the great majority of the German people. However, they cannot be held to be statutes violating natural law. . . ." The judges of the military court, who had sentenced the husband, had therefore acted within their legal competency.¹⁰

On the other hand, the court of appeal held that the accused was guilty of illegal deprivation of liberty because (a) she had been under no duty to inform, (b) she had laid the information to further her own private motives, and (c) she must have realised that an information in the circumstances of the time (leading as it did of necessity to incongruously serious consequences) "was contrary to the sound conscience and sense of justice of all decent human beings." The court corroborated this opinion by referring to the particular conception of unlawful action prevailing at the time within the German people who, in contrast to the Nazi orders, widely held such actions to be "against decency and morals."

The decision is certainly not clearly reasoned—even after making due allowance for the fact that "decency and morals" are terms of legal significance in German (though not in German criminal) law. On the other hand, it is obvious that the court decidedly did not invalidate a statute established in 1934, as Hart suggests. It is a somewhat self-contradictory decision which, far from meeting with unqualified satisfaction, was immediately and severely criticised in Germany.¹¹

II

Before dealing with the later Supreme Court decision it appears to be desirable to clear up another point. Why, an interested reader

⁸ The same misunderstanding appears in Friedmann, *Legal Theory* (3rd ed.) 457. Friedmann, however, relied upon the *Harvard Law Review* account, whereas Hart cites both a (correct) German reference and the (misleading) Harvard account.

⁹ Hart, *loc. cit.* 619.

¹⁰ It was only as an *obiter dictum* that the court, in brackets, pronounced on the theoretical possibility of statutes being in contrast to natural law and therefore unlawful; and it clearly rejected such a possibility in the particular case.

¹¹ 5 *Deutsche Rechtszeitschrift* (1950), 303-304.

may ask, were there no previous representative pronouncements by German higher courts in this context? The reason for this is that, in the years immediately following the war, cases of this type were adjudicated under the Allied Control Commission laws and directives.¹² These had by no means shunned the issue. Article I of "Military Government Law No. 1: Abrogation of Nazi Law" expressly abrogated certain laws of the Nazi period. Article II provided:

"No German law, however or whenever enacted or enunciated, shall be applied judicially or administratively within the occupied territory in any instance where such application would cause injustice or inequality, either (a) by favouring any person because of his connection with the National Socialist Party, its formations or affiliated or supervised organisations, or (b) by discriminating against any person by reason of his race, nationality, religious beliefs or opposition to the National Socialist Party or its doctrines."

There was, within the Legal Division of the Control Division, some doubt regarding the legal effects of Article II; doubt, indeed, reminiscent of the Hart-Fuller argument: Did this provision *eo ipso* abrogate laws of the type described—or did it merely give the right to the Control Commission to publish further lists (additional to Art. I) of laws not to be applied in the future? However, in this context the concepts of injustice or inequality were practically being determined by the moral or legal standards of the occupying powers. This resulted (or could be construed as resulting) in a conflict between two national legal orders, *i.e.*, between two statutory systems of positive law. This conflict conjures up difficulties of a peculiar kind while distracting from the particular problem of a higher "supra-positive" law. I therefore restrict myself to mentioning this aspect of the matter and to emphasising the *ex post facto* character of this legislation in the sense suggested by Hart.¹³ It throws into relief some of the practical obstacles to a wholesale abrogation of the laws of a whole period.

III

The Federal Supreme Court, in its decision of July 8, 1952, dealt with a case parallel to that treated by Hart and Fuller. The court

¹² See C. P. Harvey, "Sources of Law in Germany," 11 M.L.R. (1948), 196-213; K. Loewenstein, "Reconstruction of the Administration of Justice in American-occupied Germany," 61 Harv.L.R. (1948), 419-467.

¹³ *Loc. cit.* 619. An appreciation of cases brought under Control Law No. 10: Punishment of persons guilty of war crimes, crimes against peace and against humanity appears in *Manual of German Law* (Foreign Office) (1952), Vol. II, pp. 134-137. In common with the Nuremberg procedure, cases adjudicated under Control Law No. 10 were widely criticised as violating the principle of *nulla poena sine lege*. This argument is apparently justified in form. However, in substance (like the Nuremberg laws) the statute served to summarise certain classes of existing crimes and to confirm the threat of punishment in cases of their violation.

found the accused wife guilty of "unlawful deprivation of freedom" and of "attempted homicide." The facts of the case, which may be regarded as symbolic of the Nazi era, and the reasoning of the court were as follows:

The husband of the accused served with the German army since 1940 while his wife led an adulterous life at home. He made disparaging remarks to her about the Nazi leaders while on leave and, after the well-known attempt on Hitler's life on July 20, 1944, wrote in a letter to his wife: "If Hitler had been done in, the dirty mess would be all over." The accused handed this and other letters to the local party leader. In February 1945, the husband, on a night-time surprise visit at home, found his wife with another soldier. After an argument she again denounced him to the (Nazi) party, whereupon he was immediately arrested and tried before a court-martial a fortnight later. The presiding judge warned the wife that she was not obliged to give evidence under oath, that the accused was under threat of capital punishment, and that, without her sworn evidence, proof was likely to be insufficient. The wife insisted on giving evidence on oath, and the husband was sentenced to death.¹⁴ However, he was not executed but kept under arrest and finally returned to his army unit in April 1945.

In 1951 the accused (*i.e.*, the wife) was acquitted by a jury¹⁵ at Würzburg on the following grounds: (a) The court-martial (which had sentenced her husband) was lawfully constituted and had acted within the law; (b) while, notwithstanding (a), a highly educated person would have acted unlawfully in denouncing another in the circumstances of the time, the accused, being an ordinary member of the public, had acted without *mens rea*; she was entitled to believe in the lawfulness of her action because her husband, as she knew, had violated a legal obligation.

The Federal Supreme Court in its decision of July 8, 1952,¹⁶ quashed the acquittal and referred the case back to the lower court.¹⁷ The Supreme Court held:

1. Assuming the court-martial proceedings to have been lawful, an accessory to these proceedings could not have acted unlawfully. The question of the legality of a court decision must be answered uniformly for all those concerned, such as the sitting judge, the

¹⁴ Under § 5 KSSVO (special statute applying to wartime crimes) of August 11, 1938. Part of this statute is quoted by Prof. Fuller, *loc. cit.* 633. The relevant point about the crime of undermining public morale in wartime was that it had to be committed "publicly."

¹⁵ A German "jury" consists of three professional judges and six jurymen who find together on questions of guilt and punishment; usually the justices have their way.

¹⁶ 1 ST R 123/51; BGHST 3, 110-129. The account in the text is not a full translation but a summary of the contents of the judgment.

¹⁷ The Federal Supreme Court, as an appellate court, reviews only questions of law; its decisions are based upon the record of the trial under review. It usually consists of five (in the exceptional case of plenary sessions of eight to ten) professional justices of the court. Its legal findings are binding on the lower courts.

crown prosecutor, the police and the informer (provided the information laid was substantially true); they all have co-operated in bringing about the realisation of the aims of the criminal law.

2. There was no need to enter into a discussion whether the Nazi statute, under which the husband had been sentenced, was invalid because of its possible incompatibility with supra-positive norms of a higher order. Even on the assumption that the statute was legally valid there was no sufficient justification, in the factual circumstances, for a condemnation. The sentence passed by the court-martial was arrived at without due consideration given to the Nazi statute and to the established principles of German criminal law.

(a) The Nazi statute required the incriminating remarks to be made in public. It is true that the Supreme Military Court had, during the Nazi rule, developed an extremely wide interpretation of the concept of publicity. Originally it had stipulated the intention on the part of the offender to influence an undetermined number of people beyond his immediate, restricted audience. Later it held it to be sufficient that several persons were addressed successively in the expectation that the remarks would reach the public. Finally, the Supreme Military Court came to regard remarks as having been made in public, even when made in the smallest and most intimate circle, unless they could not be expected to be repeated elsewhere; and the Supreme Court of the Reich had applied similarly vague standards of interpretation at the time.

The Federal Supreme Court did, however, not pronounce on whether this type of interpretation violated the requirement of strict construction under the principle of legality¹⁸ (as it probably did). For even under the most unfavourable interpretation of the concept of publicity, the Supreme Court held, a condemnation would have required *mens rea*, i.e., the awareness and approval, on the part of the husband, of a possible breach of confidence. The remarks were made within the closest and most intimate human relationship that exists, namely, between married people; and this relationship offers a guarantee of privacy unless special circumstances are proved. No such special circumstances were however adduced. The assumption of guilt on the part of the Military Court was therefore derived from an arbitrary and unlawful interpretation of the law.

If, in the circumstances, the death sentence had been carried out, the execution would have been a case of criminal homicide in the terms of the German criminal code (section 211 *et seq.*).

(b) Moreover, the death sentence was arrived at in violation of established principles of German criminal law. The penalties threatened under the Nazi statute applied ranged from one day's

¹⁸ I am using the term "Principle of Legality," following Glanville Williams, *Criminal Law. The General Part* (1953), paras. 128-135, as standing for the maxim *nulla poena sine lege*, including the requirements of certainty of draftsman-ship, non-retroactivity, accessibility of law, strict construction, as well as in its application to punishment.

imprisonment to the death penalty.¹⁹ The wide discretion of the court in assessing the penalty finds its corollary in obligatory standards of proportional gradation of punishment; *i.e.*, the degree of wrong committed—both objectively and subjectively—entails the degree of punishment within the range established by the law. This rule follows from one of the immemorial unwritten principles of German criminal law which prohibits cruel and excessively hard penalties. In the present case, the incriminated remarks were made between spouses, who, for the purpose, may well be held to be one person. Moreover, the interest protected by the statute, *i.e.*, the military morale of the German people, was apparently endangered to a minimal extent; in fact, the “public” addressed, *i.e.*, the accused, proved to be unsusceptible of corruption. The only explanation, then, for the passing of the death sentence was that the court-martial yielded to administrative pressure directed to suppressing every critical remark or opinion. The sentence in the circumstances was pronounced, not in the course of applying the law, but as a matter of arbitrary abuse of judicial authority.

3. The accused was therefore an accessory before the fact to the crimes of unlawful deprivation of liberty (sections 239, 341, Criminal Code) up to the time of the death sentence, and of attempted homicide (sections 211 *et seq.*, 43, Criminal Code) from the time of the death sentence.

4. The accused was guilty as she had the intention to use the unlawful procedure of the court-martial to get rid of her husband. She had been made aware by the presiding judge of the court-martial that a death sentence was to follow from the evidence given on oath. It is no defence that she claims to have trusted in the legality of the court-martial procedure. The jury, in the sentence quashed, had accepted this defence because the accused, as an ordinary woman without higher education, could not be expected to recognise violations of the rules of the *Rechtsstaat*. This defence, the Federal Supreme Court held, might well apply in normal times when independent judges guarantee the liberty and dignity of the individual. However, in the Nazi era court practice often failed in what is characteristic of the due process of law, *i.e.*, the detached, factual and exhaustive consideration of the purposes of criminal law. This insight was well within the ken of an ordinary member of the public. There was, despite the warped judgment of wide circles during the Nazi period, a lively awareness in the population that administrative and legal authority could be abused for the purpose of intimidation and suppression of opposition views. Sentences, which served the purpose of political terror rather than the realisation of the law, had actually led to a

¹⁹ Fuller, *op. cit.* 653, seems to disagree with this reading of the statute though without knowledge, it appears, of the authoritative interpretation by the Federal Supreme Court as set out in the text above.

heightened popular sense of right and wrong rather than stifling it. This assumption was accepted by the Supreme Court as a matter of common knowledge; it had also been found to be correct by the jury. A mistaken belief in the legality of the court-martial procedure would be a defence only for a person who could not be expected to share the insights of ordinary members of the public. However, the facts of the case, as found by the jury, indicated that the accused, far from acting to reveal crime, just wished to make use of the best means to get rid of her husband so that she could continue her adulterous way of life. †

IV

The closely reasoned judgment of the Federal Supreme Court does not, on the whole, appear to be objectionable from the point of view of British or American lawyers although, fortunately, their recent history has not presented similarly stark situations of legal discontinuity. Some points may, however, be commented upon:

1. A condemnation of the accused as an accessory to the crime does not conflict with the fact that the judges of the court-martial (though they were the immediate agents of the crime) were not prosecuted and accordingly not punished.²⁰ The reason for *nolle prosequi* in their case was not that they had been acting lawfully in the execution of public justice, but that they had the defence of intimidation, and that, therefore, no court would sentence them. This defence, under section 53, Criminal Code, exempts from punishment if the offence is committed, *inter alia*, under a threat of immediate danger of life and limb to the actor or a relative, provided the threat could not have been averted in any other way. A judge refusing to obey Nazi orders was assumed to be in danger of his life. This construction lets convinced Nazi judges go scot-free (except for their possible prosecution under the de-Nazification procedure). It represents, in fact, an extremely weak point in post-Nazi judicature, as the threat in most cases would really have been averted through resignation on the part of the judge.²¹ In the final event, however, it appears to be materially justifiable as resignation of the judge would not have benefited the prisoner. Even in the case of an acquittal by the court-martial the prisoner would have fallen victim to the Gestapo or SS, with the same result as that of a death sentence.²² On the other hand, reverting to the position of the accused, a comparable felony, such as killing by perjury, is not treated as murder in English criminal practice

²⁰ They may have been subjected to "de-Nazification" proceedings in individual cases, though not merely because of their activities on the Bench. Such proceedings were not criminal trials and therefore did not violate the principle *ne bis in idem*. However, they were usually rather ineffective.

²¹ See Loewenstein, *loc. cit.* 444.

²² There were even cases when a prison sentence was imposed by a court in order to keep a person out of reach of the Gestapo or SS murderers. See BVerfGE 6, 214-215.

although it answers the requirements of an *actus reus* of homicide. It is, however, generally recognised that this has special reasons²³ and would therefore not create a precedent for cases such as the one under review.

2. Although misprision of felony, *i.e.*, failure to prevent or reveal a crime, is formally an offence, prosecutions never take place. The mistaken assumption of a duty to inform would be a doubtful defence even if, contrary to what was found in this particular case, an indictable offence had been committed by the husband. But could the accused have claimed the defence of justifiable ignorance of law caused by the misrepresentation of the legal position by the authorities at the time and, indeed, by the court-martial? American authorities allow a private citizen the defence of having acted under an express or implied representation of law made by a public authority. However, in English law this defence would not make mistake of law justifiable, although it may, according to circumstances, have a bearing upon the assessment of penalty.²⁴

3. There should be no conclusive objection to the judgment of the Federal Supreme Court on the grounds of the principle of legality.²⁵ The crimes, of which the accused was found guilty, were no *ex post facto* crimes; they referred back, in the form applied, to the Criminal Code of 1871. On the other hand, the interpretation of the Nazi statute by the court-martial certainly had gone beyond the limits, not only of strict, but of reasonable interpretation of the term "public."²⁶ The application of the principle of legality in its bearing on proportionality between crime and punishment may offer certain difficulties in the light of the modern tendency to divorce crime and penalty in favour of an individualisation of punishment. Glanville Williams considers a real restriction upon the discretion of the judge to be inconsistent with the notion of individualisation of punishment and sees the safeguard of liberty in adequate provision for appeals and administrative review rather than in legal rules.²⁷ However, in the particular case, not only was there a legal maximum penalty provided in the statute, but express mention was made of a minimum penalty, apparently applicable to cases of minor *actus reus* and *mens rea*. Moreover, the appeal agencies, on which Williams would put the burden, would have to apply legal rules (to avoid arbitrariness), so that his argument appears to be circular.²⁸

²³ Kenny's *Outlines of Criminal Law* (16th ed., 1952), § 86; *Russell on Crime* (10th ed., 1950), Vol. I, 482.

²⁴ Glanville Williams, *op. cit.* § 116.

²⁵ See note 18, *supra*.

²⁶ In fact, the misinterpretation was so glaring that some outstanding and brave jurists, such as Kohlrausch and Eberhardt Schmidt, expressed their criticism in print in 1944, *i.e.*, at the height of the Nazi era. Reported by Prof. R. Lange in *5 Süddeutsche Juristenzeitung* (1950), 210.

²⁷ Williams, *op. cit.* § 116.

²⁸ See H. Mannheim's comprehensive treatment of "Some Aspects of Judicial Sentencing Policy" in 67 *Yale L.J.* (1958), 961-981. "Having a sentencing

The existence of such legal rules, resulting in proportionality between crime and penalty, was convincingly declared by the court to be part of the German legal tradition, *i.e.*, of German positive law. If, beyond this, there remain doubts concerning the scope of judicial determination or interpretation of constitutional principles, these are not different from the problems with respect to the "rule of law" in English or Australian law, which "forms an assumption" as one of "many traditional conceptions"²⁹ of constitutional law.

4. The most striking point about the decision appears to be that the court made no use of higher, supra-positive, law to set aside the judgment of the court-martial. It was on procedural grounds that the Nazi sentence was quashed. Hart would recognise any legal rules as law, though they may be morally reprehensible, as long as they treat like cases alike, *i.e.*, dispense *formal* justice.³⁰ However, in the English tradition, he states, the exercise of moral judgment is demanded of the judge. By contrast, "under the Nazi régime men were sentenced by courts for criticism of the régime. Here the choice of sentence might be guided exclusively by what was needed to maintain the state's tyranny effectively."³¹ A terror sentence using the prisoner solely as an object in the pursuit of intimidation would, in such a régime, be intelligent and purposive and thus, from a purely legal point of view, as it ought to be. But does this argument stand up to scrutiny?

(a) True, the fact that the Nazi government was possessed of unlimited power does not in itself preclude a presumption of legality, nor does it establish a presumption of arbitrariness. "Power," says Wynes somewhat sweepingly, "is rarely exercised in an arbitrary manner where it is unlimited in extent and the presence of the 'Bill of Rights' provisions in America bears eloquent testimony to the weakness of 'popular' government."³² However, the situation in Nazi Germany presented a case of arbitrary use of power, though it was certainly unlimited in extent, and though the formal "Bill of Rights" provisions of the Weimar Constitution had been widely abrogated. There appeared to be a situation in which the courts were being unmistakably directed to determine questions in accordance with the interests of a particular political party; where they seemed to be "provided with at least a political standard."³³ However, it would be hard to define in legally acceptable terms what this

policy means, however, not merely using one's discretion but using it in a specific and consistent manner, with some ultimate object in view. . . . Of course, consistency is not enough for a good sentencing policy; a system of more than formal values is also needed": *op. cit.* 962.

²⁹ Dixon J., 83 C.L.R. (1951), 193.

³⁰ *Loc. cit.* 624.

³¹ *Ibid.* 613-614.

³² W. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed., 1956), 28.

³³ See Latham C.J.'s formulation in the *Communist Party* case, quoted Wynes 44.

standard really was: Arbitrariness at the legislative-executive head resulted in lack of consistency in governmental directives; the constitutional basis of the "Enabling Law" (which vested legislative power in the executive) was, to say the least, extremely doubtful; and finally, unwritten established principles of the Constitution and of the law tradition, the equivalent of the "genius of the common law" (not to mention the, undeservedly and often maligned, "rule of law"), were being violated by the Government. The arbitrary interpretation of the Nazi statute by the court-martial sentencing the husband, as well as the application of the death penalty in the particular circumstances, illustrate the objective deterioration of judicial independence and of devotion to legal, in contrast to political, considerations.

To regard intimidation in the interest of the ruling party as the declared purpose of the German criminal law at the time of the death sentence, as Hart suggests,³⁴ is therefore an arbitrary assumption. In reality, the Criminal Code of 1871 was still in force, as was the large body of pre-Nazi law. The judiciary were still supposed to be independent though they might have to pay a price for it, and though they widely violated the duties imposed on them by their office. The courts had to choose between applying the criminal law as established by statute, interpretation and precedent, and, on the other hand, obeying the shifting and often contradictory administrative directives of the government of the day. A situation offering such a choice (and without a Chief Justice Coke to rectify it) *eo ipso* presents an obstacle to like treatment in like cases. In fact, arbitrariness rather than consistency marked judicial practice no less than administrative activity under the Nazis. ✓

(b) It is, in fact, a point of interest that a dictatorship would of necessity be driven to perverting procedure rather than the material law. The dictatorial government can make certain laws to suit its particular purposes. But it cannot change the whole of the complex body of substantive law so as to favour its followers in all cases. Apart from the technical difficulties involved, its rationale is really the desired ability *arbitrarily* to decide on various issues from time to time.³⁵ A statute directing the courts to follow varying governmental orders regarding the definition and punishment of crime would obviously not be law, even in Hart's sense; it would, by definition, be the very contrast of law, namely, arbitrariness. Even dictatorships are reluctant to reveal their character to such an extent. It is therefore not surprising that the Federal Supreme

³⁴ I find it difficult to decide whether Hart's assumption to this effect is factual or only hypothetical. Some of his expressions appear to point to the latter interpretation. However, the very fact that he used an actual case in a particular social setting as his paradigm, gives, to my mind, decisive weight to the first alternative.

³⁵ This question has been dealt with in my paper "On the Sociology of Natural Law and Obedience to Law," to appear in a forthcoming A.N.U. symposium on legal sociology.

Court should, in this and other cases, have concentrated on questions of judicial interpretation and procedure rather than on that of the validity of statutory law.

(c) Could Hart's position be supported on the basis of an unqualifiedly sociological theory of law? It may be possible to argue that, notwithstanding existing statutes and established legal principles, there was then prevailing a clear-cut political climate (directed at suppressing all opposition), and that this attitude was backed by popular acceptance expressed in obedience to the law. This attitude would result in the "living law" voiding statutes and principles not in accordance with it. However, a theory of this type is actually not far removed from "higher law" theories, to which Hart objects. Moreover, the Federal Supreme Court dealt with this question, when it stated that the population as a whole did not, though it co-operated, accept the Nazi actions as being law. If correct, this statement would have a decisive bearing upon the, for Hart, crucial question "what it is for a social group and its officials to accept such (fundamental legal) rules. . . ."³⁶

The question of the acceptance of or obedience to law is important not only from the angle of the moral justification of fidelity to law (as Fuller treated it) but also in a factual, sociological sense. Popular law consciousness and law convictions have increasingly been recognised as being a decisive element of law; so by Hauriou, the phenomenological lawyers (following Dilthey), Krabbe, Kranenburg, Hägerstrom. The question of the significance of popular opinion regarding what is legally binding would lead beyond the scope of this note. But the question of what constitutes evidence for such public opinion, and to what extent it may be noticed by courts, is relevant to the case under review. The Federal Supreme Court accepted, as a matter of general public knowledge, that there was an awareness in the population of the unlawfulness of Nazi terror acts; that, in fact, the popular sense of right and wrong had been heightened just by witnessing arbitrariness on the part of the powers-that-be.

(d) The Federal Constitutional Court,³⁷ too, has, in repeated decisions, pronounced on the lawless state of affairs and the popular

³⁶ This notion, "not that of a command, as Austin claimed, is the key to the science of jurisprudence, or at least one of the keys." Hart, *loc. cit.* 603. I leave the relevant question open, under what conditions you may disclaim consent, while acting according to the principles you disclaim.

³⁷ The Federal Constitutional Court is an autonomous and independent court with jurisdiction over cases involving the forfeiture of basic rights, the constitutionality of political parties, the review of elections to the federal parliament and of international treaties, judicial review, constitutional complaints, impeachment of the President of the Federal Republic and of judges, disputes between constitutional organs of the Federal Republic under the Basic Law and between the Federal Government and the *Laender*. The court consists of two senates of eight to ten judges each (with seven constituting a quorum). The decisions of the Constitutional Court are published in *Entscheidungen des Bundesverfassungsgerichts* (eight volumes to date); they are cited as BVerfGE. See Taylor Cole, "The West German Federal Constitutional Court," in 20 *Journal of World Politics* (1958), 278-317.

awareness of this in the Nazi era.³⁸ The Civil Division of the Federal Supreme Court has, however, precluded such a situation from being a fit subject for judicial notice, as the underlying facts were established upon the insecure basis of an historical value-judgment³⁹; and this pronouncement has found widespread backing in German learned periodicals. From this it is clear that the facts, as taken for certain by the courts mentioned earlier, are at least not a matter of undisputable general public knowledge and, therefore, not an obvious subject for judicial notice. This weakness, however, applies of necessity to a large portion of facts and circumstances which, nevertheless, are acceptable as being established; such as historical events, standard works, the general nature and development of accepted tenets (such as Communism as a political philosophy ascertained from serious studies as distinct from polemics).⁴⁰ The Federal Constitutional Court, indeed, was able, in a brilliant subsequent decision, to show up the inner inconsistency and hypocrisy of the learned critics as well as the, for practical purposes, erroneous conception of historically established facts as resting upon a mere value-judgment.⁴¹ The court established its point "after such information or investigation as it consider(ed) reliable and necessary in order to eliminate any reasonable doubt," and thus accepted "the presumption that all persons are aware of it."⁴²

By establishing illegality as an historical fact within judicial knowledge the court *eo ipso* established that the ordinary person must be aware of this fact. However, while this is convincing for the time when the Federal Supreme Court reviewed the case, it is not necessarily so concerning the time when the Nazis ruled and when the accused wife committed the alleged crime. The form in which the Supreme Court stated this assumption *simpliciter*, by taking judicial notice of it, certainly invites criticism. However, the Federal Constitutional Court has given close attention also to this point. It has, on the basis of a detailed survey of historical sources, concluded that the ordinary citizens (including office bearers), for whatever reasons they gave allegiance to the Nazi system, did so, not because they believed in its legality, but *although* they realised that it was arbitrary and violated law and order.⁴³

³⁸ *Inter alia*, BVerfGE 1, 426-428; 3, 58 *et seq.*

³⁹ BGHZ 13, 265 (299).

⁴⁰ See the enumeration in Wynes 61. German courts are altogether less restrictive than Australian courts in the scope of evidence admitted regarding political, economic, etc., facts. Their practice is rather similar to the "Brandeis brief" practice in the United States. See E. McWhinney, "Legal Positivism in Australia," 2 *Am.J.Comp.Law* (1952), 47; and "The German Federal Constitutional Court in the Communist Party Decision," 32 *Indiana L.J.* (1956), 309.

⁴¹ BVerfGE 6, 167 *et passim*.

⁴² See Fullagar J. in the *Communist Party* case; Sawyer, *Cases on the Constitution*, etc. (2nd ed., 1957), 380. I am leaving aside the (not insuperable) perplexities necessarily connected with the presumption that all persons are aware of facts which the court deems to be subject to reasonable doubt.

⁴³ BVerfGE 3, 58 *et seq.*; 6, 132 *et seq.*

That this account of the situation was probably correct is further borne out by the criticism of the Nazi statute which some jurists of high integrity had published in 1944, *i.e.*, at the height of the Nazi era.⁴⁴

5. Finally attention may be drawn to a dilemma inherent in the post-war legal situation in Germany, a dilemma which Hart in particular may have taken somewhat too lightly. Hart emphasises that undesirable Nazi enactments should have been abrogated by retroactive legislation rather than by judicial review. This requirement apparently follows from the principle of separation of powers, which prevents the courts from impinging upon the legislative function.⁴⁵ Conversely, however, this principle erects a barrier to legislative interference with *res judicata*. "The Commonwealth Parliament could not, of course, reverse a decision of a High Court, but could pass a declaratory Act describing a rule of conduct for the future. To attempt the former would be a clear invasion of the judicial sphere."⁴⁶ Without wishing to go into a deeper analysis of Hart's point, the fact may be stressed that he does prefer one sort of invasion to the other, though both violate the same principle.

Altogether, administrative and judicial abuses of law appear to have accounted for more of the knotty legal problems of the post-Hitler era than did the legislative enactments of the régime. Moreover, not all decisions arrived at on the basis of objectionable statutes were objectionable *per se*, while many decisions based upon pre-Nazi statutes were. Neither a purely legislative nor a purely judicial review of the legal Nazi legacy could offer a comprehensive solution. The Federal Constitutional Court has therefore developed and applied a sociological theory of law with a view to a compromise solution; *i.e.*, a solution which permits the courts to weed out the unwholesome, while preserving such legal relationships as, though based upon Nazi enactments, require preservation in the interest of legal continuity and order. But this theory leads beyond the scope of this paper.

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⁴⁴ See note 26.

⁴⁵ Hart's preference for legislative action is also in keeping with the requirement of legal security. However, this would be safeguarded to a similar, perhaps the same, extent, by judicial review on the highest level, *i.e.*, when a binding precedent is created.

⁴⁶ Wynes 171.

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THE PRIVILEGE AGAINST SELF- INCRIMINATION AS TO ADULTERY

SHOULD IT BE ABOLISHED?

OF all the various matrimonial offences, there is only one in respect of which the parties can claim privilege against self-incrimination, and that only to a limited degree, namely, adultery. It is hard to discover what the justification is for this peculiar privilege, and the object of this article is to show that such privilege is quite unnecessary, that is, it has no basis in reason, it is anomalous, an anachronism, operates capriciously and unjustly and, in the form in which it exists, is absurd and should be abolished.

At the present time, so far as the High Court is concerned, the relevant section is section 32 (3) of the Matrimonial Causes Act, 1950,¹ which reads as follows:

“The parties to any proceedings instituted in consequence of adultery and the husbands and wives of *the parties* shall be competent to give evidence in *the proceedings*, *but* no witness in any *such* proceedings, whether a party *thereto* or not, shall be liable to be *asked* or *be* bound to answer any question tending to show that *he or she* has been guilty of adultery unless *he or she* has already given evidence in the same proceedings in disproof of *the* alleged adultery.”

So far as inferior courts are concerned, and in particular the magistrates' courts, the relevant provision is section 3 of the Evidence Further Amendment Act, 1869,² which reads as follows:

“The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of *such parties*, shall be competent to give evidence in *such proceeding*: *Provided that* no witness in any³ proceeding, whether a party *to the suit* or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless *such witness* shall have already given evidence in the same proceeding in disproof of *his or her* alleged adultery.”

Although the sense is practically identical in both sections, there have been verbal alterations which are indicated by the words in italics.

¹ 14 Geo. 6, c. 25.

² 32 & 33 Vict. c. 68.

³ The word “such,” which is absent here but appears in the corresponding place in s. 32, above, was read into the section. See Rayden, 7th ed., 474, note (b).

Section 3 of the Act of 1869 was repealed but re-enacted as verbally altered for the High Court by section 198 of the Supreme Court of Judicature (Consolidation) Act, 1925,⁴ which itself was repealed and re-enacted by section 32 of the Matrimonial Causes Act, 1950.

What then is the extent of this privilege? It only arises where there is a charge of adultery in proceedings instituted in consequence of adultery, and where in the same proceedings the party or the witness has not given evidence denying the charge. Once the party or the witness gives evidence denying the charge, the privilege ceases. In all cases where the proceedings are not instituted in consequence of adultery, then so long as the question is relevant a party or witness is bound to answer questions imputing adultery. There are numerous cases establishing this. In proceedings for legitimacy,⁵ nullity,⁶ slander⁷ and cruelty,⁸ questions as to adultery have been allowed simply because the questions were relevant and these proceedings were not instituted in consequence of adultery.

It is to be noted there is no privilege where the adultery is merely an issue in a proceeding, or is alleged in a proceeding, but only where the proceedings are "instituted in consequence of adultery." This can best be illustrated by an example. Supposing a wife issued a summons against her husband in a court of summary jurisdiction on the ground of desertion, or it may be persistent cruelty or wilful neglect to maintain. By section 6 of the Summary Jurisdiction (Married Women) Act, 1895,⁹ it is a complete defence to the summons for the husband to show that his wife has committed adultery which he has not condoned, connived at or conducted to. The only procedural requirement is for the husband to give notice in writing to his wife, setting out the particulars of his allegations of adultery.¹⁰ Can the husband or the wife in such circumstances claim the privilege of refusing to answer questions as to their adultery? There appears to be no authority,¹¹ but it is submitted that the answer clearly is that no such privilege exists. The only relevant statutory authority is section 3 of the Act of 1869. In order to qualify for the privilege the parties would have to show that proceedings had been instituted in consequence of adultery, but in such a case the proceedings were not instituted in consequence of adultery but in consequence of desertion or persistent cruelty or wilful neglect to maintain, as the case may be. A proceeding "instituted" means one commenced. It does not mean

⁴ 15 & 16 Geo. 5, c. 49.

⁵ *Evans v. Evans and Blyth* [1904] P. 378.

⁶ *M. (orser, D.) v. D.* (1885) 10 P.D. 75.

⁷ *Blunt v. Park Lane Hotel, Ltd.* [1942] 2 K.B. 253.

⁸ *Miller v. Miller, The Times*, April 7, 1922; *Lewis v. Lewis* [1958] P. 193.

⁹ 58 & 59 Vict. c. 39.

¹⁰ *Duffield v. Duffield* [1949] 1 All E.R. 1105.

¹¹ *Lewis v. Lewis* [1958] P. 193 is directly in point but applies to proceedings in the High Court. So far as the writer knows there is no reported case where the question has arisen in the magistrates' court.

for this purpose a step in an action, or a defence in an action or an answer to a petition. It was established in *Blackborne v. Blackborne*,¹² an authority under the Evidence Act, 1851,¹³ that a petition for the restitution of conjugal rights to which an answer had been filed charging adultery and praying for a judicial separation was not a suit or proceeding instituted in consequence of adultery and, therefore, the evidence of the parties was admissible. It will be remembered that at this date, 1868, the parties were not competent to give evidence in suits instituted in consequence of adultery.

In the magistrates' court proceedings are "instituted" when the INFORMATION is laid, or the COMPLAINT is made.¹⁴ It follows, therefore, that a mere notice given by a husband under section 6 of the Act of 1895 alleging adultery against his wife is not a "proceeding instituted," nor would a similar notice by a wife to her husband that she intends to allege adultery as part of his misconduct in cruelty or desertion be a "proceeding instituted." The parties may, therefore, be questioned as to their adultery and are bound to answer, and presumably other witnesses would be in the same position.

It will be noticed that the Act of 1869 was enacted long before any proceedings were available by married women to obtain maintenance in the magistrates' court,¹⁵ and no one seems to have noticed that the provisions as to adultery in that Act are not apt for the magistrates' court where there are no pleadings. If the wife had issued a summons on the ground of her husband's adultery, then the question would not be admissible (unless the husband denied adultery on oath, when the privilege would not arise), but simply because it arises as an issue in proceedings not instituted in consequence of adultery, it is permissible. The best comment on such a situation is that of Lord Penzance in the case of *Blackborne v. Blackborne*,¹⁶ where he said:

"I should like to be able to decide the question on some reasonable ground, but it quite passes my comprehension that it should be proper to admit the evidence of the husband and wife on the question of adultery in a suit for restitution, and improper to admit it in a suit for dissolution or judicial separation. The reasons for and against allowing the parties to be examined on such a question are well known, but it is impossible to suggest a reason why the admission or exclusion of their

¹² (1868) L.R. 1 P. & D. 241.

¹³ 14 & 15 Vict. c. 99.

¹⁴ See Stroud's *Judicial Dictionary*, 3rd ed., p. 1471, and the cases cited there.

¹⁵ The first summary remedy for a wife was contained in s. 4, Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), which provided that a wife whose husband had been convicted of an aggravated assault upon her could apply to the magistrates for maintenance. More remedies were provided by the Summary Jurisdiction (Married Women) Act, 1895, which settled the law substantially as it is today.

¹⁶ (1868) L.R. 1 P. & D. 241.

evidence should depend upon the form of the suit. . . . In deciding a question of this kind I cannot be guided by the reason or sense of the matter, because there is no sense or reason in it. I have nothing to look to but the language of the Act."

It was Lord Penzance who introduced the second reading of the Bill, in the House of Lords, which was to become the Act of 1869, but in removing one anomaly he retained another equally absurd. That Act, as we have seen, made husbands and wives competent witnesses in cases instituted in consequence of adultery, but retained the privilege against self-incrimination in those cases. To adapt his words in *Blackborne v. Blackborne*, why there should be this privilege only in that class of case but not when adultery is an issue in any other class of case passes one's comprehension, and it is impossible to suggest why the privilege should depend on the form of the suit. Truly, there is no sense or reason in it.

There is no protection to the parties in other matrimonial offences, though cases of cruelty may involve criminal offences like assault and battery, wounding and sodomy, and the protection in adultery is, as we have seen, limited only to cases "instituted in consequence of adultery." How then did this limitation arise? The reason seems entirely historical.

Until 1851 no parties or their husbands or wives could give evidence in a suit. This disability was removed by the Evidence Acts of 1851 and 1853,¹⁷ but by section 4 of the Act of 1851 it was provided: "Nothing herein contained shall apply to any action, suit, proceeding, or Bill, in any court of common law, or in any ecclesiastical court or in either House of Parliament, instituted in consequence of adultery." It will be remembered that at this time there was no divorce, except by Act of Parliament, and all matrimonial proceedings were in the ecclesiastical courts.

The Matrimonial Causes Act, 1857,¹⁸ besides providing for divorce through the courts, removed the jurisdiction in matrimonial matters from the ecclesiastical courts to the Divorce Court but by section 48 the rules of evidence were to be the same as in the common law courts, with the result that the parties could not give evidence in cases instituted in consequence of adultery. To remedy this state of affairs the Act of 1869 was passed and in the House of Lords Lord Penzance introduced the second reading with these words¹⁹:

"It was thought by many, himself included, that it was undesirable anyone should be put in the witness box and be asked whether he or she had committed adultery and the sympathy for a person placed in that position—especially a man whose admission involved the public dishonour of a woman

¹⁷ Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83).

¹⁸ 20 & 21 Vict. c. 85.

¹⁹ *Hansard*, House of Lords (July 26, 1869), 671.

—dictated the exception on that head. But the form of the exception was this—instead of providing simply that this question as to whether he or she had committed adultery should not be put, it was provided that parties to such suits instituted on account of adultery should not be examined as witnesses. It happened that in the court over which he presided many suits were instituted on account of adultery which involved other questions and the exception had had the effect of shutting the mouths of the parties to the suit as regards questions—say of desertion and cruelty—when in many cases they alone could speak directly to the facts; and the result had been to cause very great expense in bringing witnesses from all parts of the country to prove facts within the knowledge of the parties to the suit. As the Act was passed before the Divorce Court was established the result was purely fortuitous, and there seemed to be no reason on earth why a man or woman should not be asked any questions touching the adultery of either husband or wife and yet a suit being instituted on account of adultery made it impracticable. There was another evil which followed from the exception. Whatever might be said as to the propriety of asking a witness whether he or she had committed adultery, there seemed no such objection in a suit between husband and wife to asking one party as to the adultery of the other. It was even possible under the present law for a man to go into a room and find his wife in the act of adultery and be incompetent to state the fact in evidence.²⁰ Had it not been that some amendment had been made in the original law the business of the Divorce Court could not have been carried on at all; and as it was the Act making that amendment, 22 & 23 Vict. c. 61, led to fresh inequalities by limiting the repeal of the exception to only two cases, in order to allow a woman to prove desertion and cruelty by her husband. The amendment permitted the husband and wife to give evidence in cases where the suit was instituted by the wife on the ground of cruelty and desertion, but this only met the case where the wife was the petitioner, for unfortunately, if the husband brought a charge of adultery and the wife answered it by a charge of cruelty and adultery she could not be a witness upon the subject of cruelty because the suit was instituted on the ground of adultery.”

It will be seen that Lord Penzance was concerned almost wholly with removing the disability of the parties to give evidence in proceedings instituted in consequence of adultery, and that he was

²⁰ It is interesting to see how Lord Penzance dealt with this situation when it came before him in his court. In *Blackborne v. Blackborne*, L.R. 1 P. & D. at 567, he said: “In one case a husband found his wife in bed with another man, and there was no other evidence of her adultery. As the suit was not defended I availed myself of the power given by statute to the court to call and examine the petitioner, and took his evidence (*Tatham v. Tatham and Nutt*, 3 Sw. & Tr. 511); but if it had been contested, I should not have done so. That is only one instance of the monstrous absurdity of the law as it at present stands.” If he could have seen the results of the proviso to s. 3 of the Act of 1869, would not his remarks have been equally pungent?

not concerned with the proviso, nor in the debates in the House of Commons and in the House of Lords on this Bill does there appear to have been any discussion with regard to the proviso. This section has been re-enacted twice, in 1925 by section 198 of the Supreme Court of Judicature (Consolidation) Act of that year, and section 32 of the Matrimonial Causes Act, 1950. As both these Acts were Consolidation Acts, there was no debate in Parliament on either occasion.

Since 1869 there have been a number of cases which have shown the limitation of this privilege, and that it is really not appropriate in its present form. It is something of a mystery why Lord Penzance retained the proviso, but it is presumed that he thought by retaining the proviso he could make sure of getting his main point through Parliament, that is to make the parties competent²¹ witnesses in adultery cases, and that he pursued the traditional process of not making too radical a change but proceeded by easy stages.

What is the principle behind the proviso? "The great principle of the common law of the country is that a party cannot be required by evidence to criminate herself or himself." So said Lord Merivale in *Cavendish v. Cavendish*.²² Whether this was actually the principle of common law or not, it is certain that by statute great inroads have been made into it, and in *Hulbert v. Hulbert*²³ it did not find much favour in a matrimonial case where cruelty was alleged. The headnote reads: "In matrimonial cases where cruelty or desertion is alleged, interrogatories are permissible where they are necessary either for fairly disposing of the case or for the saving of costs." Lord Denning said:

"After the Divorce Court was set up it too allowed interrogatories to be administered: see *Harvey v. Lovekin* (1884) 10 P.D. 122; 1 T.L.R. 186, and *Redfern v. Redfern* (1891) P. 139; 7 T.L.R. 157. The only exception is that in an adultery case a petitioner is not allowed to prove adultery by interrogatories. That exception arises from the fact that under the statute (originally section 3 of the Evidence Act, 1869, and now section 32 of the Matrimonial Causes Act, 1950) there is a fetter on the asking of questions which go to prove adultery. The statute puts adultery on a special footing. There is no such fetter on questions as to cruelty and desertion."

The reason for the privilege in adultery is given by Lord Justice Bowen in *Redfern v. Redfern*²⁴ as follows:

"It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered,

²¹ "Competent" in this context means "compellable" as well. See *Tilley v. Tilley* [1949] P. 240, where there is a particularly useful history of the subject by Lord Denning.

²² [1926] P. 10, at 14.

²³ [1957] P. 174.

²⁴ [1891] P. 139, at 147.

would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it—that ‘No one is bound to criminate himself.’ Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastic monitions that is now technical and obsolete, the privilege in such a case has never been abrogated.”

And Lindley L.J. at p. 144 says:

“It was contended that suit for divorce for adultery was a criminal proceeding, or at all events, that adultery exposed the adulterer to punishment, or to some kind of penalty—i.e., penance or fine. It was, however, decided by the House of Lords in *Mordaunt v. Moncrieffe*, L.R. 2 H.L.Sc. 374, that a suit for divorce was a purely civil, and in no sense a criminal proceeding. But adultery, like other forms of fornication and lewdness, exposes the guilty party to ecclesiastical censure and punishment. . . . It is true that ecclesiastical punishment for such offences is practically obsolete; but I cannot say that the jurisdiction of the courts in this respect has ceased. Indeed, the enactment to which I am about to refer (Act of 1869, s. 3) is based on the theory that adultery is punishable, and that no person, therefore, is bound to answer any question tending to prove himself or herself guilty of it.”

Since, however, the case of *Blunt v. Park Lane Hotel, Ltd.*,²⁵ whatever the position was in 1891, it is quite certain now that the reason for this privilege has completely gone.²⁶

In 1934, Maugham L.J. in *Elliott v. Albert*²⁷ described as fanciful the possibility of ecclesiastical censure, and in *Blunt's* case Lord Clauson stated that the jurisdiction in this respect had not been exercised for 150 years and was obsolete, and in the same case Goddard L.J.,²⁸ as he then was, said:

“Dealing first with the general objection, which applies both to oral evidence and to interrogatories, the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen’s Bench in *R. v. Boyes*, 1 B. & S. 311, and the words in which I have stated it are those of Stephen J. in *Lamb v. Munster* (1882)

²⁵ [1942] 2 K.B. 253.

²⁶ In *Lewis v. Lewis* [1958] P. 193, when counsel referred to the principle in *Redfern v. Redfern*, Hodson L.J. said: “That has gone since *Blunt v. Park Lane Hotel, Ltd.*, decided that the privilege of not answering such questions as being incriminating had become obsolete.”

²⁷ [1934] 1 K.B. 650, at 666.

²⁸ [1942] 2 K.B. 253, at 257.

10 Q.B.D. 110. A party can also claim privilege against discovery of documents on the like ground: see *Hunnings v. Williamson* (1883) 10 Q.B.D. 459. Is there, then, except in a case of a clerk in holy orders, any reasonable likelihood that such interrogatories would expose a person to ecclesiastical penalties? It is purely fantastic to suppose anything of the sort."

He would have none of it. Since, therefore, an admission of adultery does not expose the deponent criminally to a charge, penalty or forfeiture, why should the privilege continue? It is true that the privilege is confined to proceedings instituted in consequence of adultery, that is to say, when a person has to face a charge of adultery, but it does not apply in other cases. In criminal cases the privilege is the other way round. By the Criminal Evidence Act, 1898, accused persons are compelled to answer questions in cross-examination tending to criminate them of the offence charged, but may not be asked questions tending to criminate them as to other offences.²⁹

The privilege against self-incrimination does not apply to civil cases, that is to say, it is never applied to protect a witness against a civil liability, and matrimonial offences come clearly within the civil jurisdiction and not criminal.

The scope of the privilege in any event is very narrow. If a person denies adultery in the witness box, he can be cross-examined about it.³⁰ If there is a charge of adultery in a petition, and the petitioner establishes a prima facie case, then if the respondent does not deny his adultery in the witness box, almost inevitably it follows that the adultery will be held to be proved. It is true there is the case of *Poyser v. Poyser*,³¹ where it was stated by the Court of Appeal that the court need not necessarily take the failure strongly against the party, or as a proof of guilt if he does not deny adultery, but that was a very peculiar case where the husband had four times alleged adultery against his wife in the magistrates' court, and each time she denied it on oath and had been cross-examined. When the charge was repeated in the Divorce Court, counsel refused to allow her to deny it to save her from further cross-examination, but even in that case the court held that there should be a new trial. As a matter of practice, once a prima facie case has been established and the accused party does not deny the allegation on oath, a finding against him is almost inevitable except in the most exceptional circumstances.

²⁹ 61 & 62 Vict. c. 36, s. 1 (e) and (f).

³⁰ There is a conflict of view on the point whether, on a denial of one allegation only, as of adultery with a particular person, the privilege may be claimed in respect of a different allegation. See *Morton v. Morton* [1937] P. 151; *MacIntyre v. MacIntyre* [1946] 1 All E.R. 121; and *Barber v. Barber* [1949] P. 169, and compare with the earlier cases referred to in Cowen, "Adultery and the Privilege against Self-Crimination" (1949) 65 L.Q.R. 373.

³¹ [1952] 2 All E.R. 949.

Two recent cases on this subject are of interest, and show quite clearly how the privilege is dependent on the form of the proceedings.

The first case is *Corfe v. Corfe*,³² in which the husband petitioned for the dissolution of his marriage on the grounds of his wife's adultery and desertion. The wife filed an Answer denying the adultery and cross-petitioned for a decree on the ground of her husband's desertion. The wife did not, in her evidence in chief, deny committing adultery, but it was held that she could be cross-examined because her Answer had been verified by affidavit and therefore her denial on oath became evidence in the proceedings within the meaning of section 32 (3) of the Matrimonial Causes Act, 1950. The strange thing is that if the wife had merely filed an Answer containing a simple denial, and not cross-petitioned, it would not have been necessary to verify her Answer by affidavit, and therefore she could not have been cross-examined.³³ To take the matter a step further, supposing the wife had issued a petition on the ground of desertion and the husband had, by his Answer, cross-petitioned on the grounds of adultery and desertion and she had merely filed a Reply limited to a statement that the Petitioner joined issue on the allegations made in the Answer, it would still not have been necessary for her to have verified her Reply by affidavit, and therefore she would not have been liable to cross-examination.

The second case is that of *Haynes v. Haynes and Sawkill*,³⁴ in which the husband, in his Petition, alleged adultery against his wife and the wife, by her Answer, admitted adultery but alleged condonation, connivance and conduct conducing. She cross-petitioned for divorce on the ground of cruelty and asked for discretion. When the husband was cross-examined it was proposed to ask him whether he had committed adultery. It was conceded that the question was relevant, but it was argued that the husband was entitled to the protection of section 32 (3) of the Matrimonial Causes Act, 1950. The judge, Wrangham J., held that the question could not be asked on the ground that the proceedings were instituted in consequence of adultery, and that the wife's cross-petition was not a separate proceeding.

While no doubt the decision was correct, it exposes the complete fatuity of the rule, since if the wife had commenced proceedings on the ground of cruelty, as she might well have done, then the proceedings would not have been instituted in consequence of adultery even though the husband had cross-petitioned on the ground of the wife's adultery, and in those circumstances the husband would have had to answer questions concerning his adultery.

³² [1960] 1 W.L.R. 208.

³³ Divorce rule 17 (1), Matrimonial Causes Rules, 1957.

³⁴ *The Times*, April 8, 1960.

In 1949, Mr. Zelman Cowen in an article ³⁵ said:

"The truth seems to be that it is virtually impossible to produce a rational justification for the existence of the privilege."

And he wondered why it had been re-enacted in 1925.

Having regard to all these considerations, is it not time that this Adulterers' Charter (and a very poor charter it is) be abolished, certainly as regards parties to proceedings? As regards witnesses, different considerations apply, but if witnesses are to be protected, it is suggested that it should not be limited to cases where proceedings are instituted in consequence of adultery, but in all proceedings where adultery is in issue or has been alleged.

There is at present before Parliament a Matrimonial Proceedings (Magistrates' Courts) Bill which consolidates with important amendments the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and related enactments governing the jurisdiction of magistrates' courts in matrimonial proceedings. Is not this a good opportunity to clarify and bring up to date the law on the subject of this privilege?

LIONEL ROSEN.*

³⁵ See note 30.

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STATUTES

THE OBSCENE PUBLICATIONS ACT, 1959

THIS Act is described in the Long Title as "An Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography." It is a compromise measure, the result of a long struggle between the Home Office and the would-be reformers, which began over five years ago, and was only brought to a successful conclusion by the patience and diligence of the small group of private Members of Parliament who were determined to see it through. The steps in the parliamentary history of the measure are described by Mr. Roy Jenkins, M.P., elsewhere.¹ The law of obscene publications is now consolidated by the Act, so that henceforth all prosecutions will be under its provisions.

Defects in the existing law

It was almost universally acknowledged that there were, prior to this Act, serious defects in the existing law relating to obscene publications, both with regard to the misdemeanour of publishing an obscene libel and with regard to the destruction order procedure under the Obscene Publications Act, 1957.² The main complaints were as follows:

1. The so-called "Hicklin test"³ of the tendency of the matter in question to deprave and corrupt those whose minds were open to immoral influences and into whose hands a publication of this sort might fall, was felt to be unduly narrow and unfair in its scope and operation. It failed to make the intention of the accused the paramount consideration, and subjected him to an objective test with regard to the tendency or likely effect of the work in question. The courts had shown themselves to be extremely capricious in the application of this test.
2. The possibility that a work might be judged on the strength of isolated passages instead of by looking at the work as a whole.
3. The non-availability of any defence of publication for the public good.

¹ Roy Jenkins, "Obscenity, Censorship, and the Law: The Story of a Bill," *Encounter*, Vol. XIII, No. 4, October 1959, p. 62 *et seq.*

² For a full critique, see Norman St. John-Stevas, *Obscenity and the Law*, 1956. See also the present writer's article, "Obscenity in Modern English Law," *Law and Contemporary Problems*, Autumn 1955, p. 630 *et seq.*

³ Derived from Cockburn C.J.'s judgment in *R. v. Hicklin* (1868) L.R. 3 Q.B. 360.

4. The non-availability of any right to tender expert evidence as to the literary or artistic merits of the work in question.
5. Destruction orders might be made without giving the author or publisher any notice of the proceedings or any opportunity to be heard.

The struggle for reform

Criticism of the existing law came to a head following several prosecutions of reputable publishers in 1954. The Society of Authors formed a committee to consider the existing law and to recommend reforms. The case for reform was submitted to the Home Office, together with a draft Bill, which was published in February 1955. It was hoped that the Government would introduce a comprehensive measure dealing with this as well as with the problem of horror comics, which was greatly exercising the public at that time. Instead, the Government limited its proposals to a measure dealing with horror comics, which became law as the Children and Young Persons (Harmful Publications) Act, 1955. This preserved the Hicklin test of the tendency to corrupt, but it did insist that the work in question must be looked at as a whole. The would-be reformers showed their disappointment by introducing their own Bill under the Ten-Minutes Rule, and by putting down a whole series of limiting amendments to the Government's Bill. It was not possible to make much further progress in 1955 because of the impending General Election, but in the autumn a Private Member received a place in the ballot for Private Members' Bills. When he introduced a Bill to deal with obscene publications it was talked out.

A year later another Private Member secured a place in the ballot, with much greater prospects of success, and in the debate on the Bill in March 1957 the Government suggested that the whole matter should be referred to a Select Committee for examination, and this was done. The Committee was divided between "reformers" and "censors," and the result was inevitably a compromise report. Additional powers of search and seizure for the police were recommended, but at the same time many liberal provisions were espoused, the most disputed being that relating to the availability of expert evidence on the literary or artistic merit of the work. The Report of the Committee was published in March 1958,⁴ and a new Bill was introduced to implement its recommendations. The hope that it might be possible to persuade the Government to accept responsibility for this measure proved illusory, but the Bill was introduced under the Ten-Minutes Rule, only to lead to inevitable failure. It was then that Sir Alan Herbert decided to stand for the East Harrow by-election, confining his platform almost entirely to this issue of the blocking of

⁴ H.C. 123-I of 1958.

the reform of the law relating to obscene publications. The result was a sudden change of heart at the Home Office, and the promise of a debate and an unopposed Second Reading for the Bill. However, all was not yet in the bag, for at the Committee Stage a strenuous battle had to be fought with the representatives of the Home Office, who resisted the liberal provisions of the Bill at every point. Eventually some degree of success was achieved, including the restoration of the "expert evidence" clause, but the Government still fought to strike it out, and objection was also made to the clause requiring the consent of the Director of Public Prosecutions to the institution of proceedings for obscene publications. In the result, the latter clause was dropped, the former retained, and the Bill went through the Commons and the Lords without much further mutilation. It is a monument to the persistent efforts of its promoters.

The new law

It may be convenient in discussing the new law to follow as closely as possible the five main defects of the old law which have been outlined above.

1. The Hicklin Test

The Select Committee did not consider it advisable to depart substantially from the definition of obscene libel laid down in *R. v. Hicklin*,⁵ notwithstanding all the criticism. It considered that judicial interpretation had removed some of its vagueness and uncertainty, and that it would be a mistake to start afresh with a completely new definition. This much was conceded by the Society of Authors in giving evidence, though originally they had advocated much more drastic changes. Section 1 of the new Act provides that an article shall be deemed to be obscene

if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

The Select Committee desired to clarify the test with regard to the classes of persons affected by the obscenity, so as to reproduce the effect of the extremely intelligent judgment of Stable J. in *R. v. Secker & Warburg*.⁶ The test should be the persons likely to see or read the matter in question, and it should not simply be a question of the tendency to deprave and corrupt the young of either sex, as had sometimes been held in the past. For, as Stable J. had said, a great mass of literature was from many

⁵ *Loc. cit.* note 3, *supra*.

⁶ [1954] 1 W.L.R. 1138.

angles wholly unsuitable for reading by the adolescent. The Committee rejected the somewhat narrower test suggested by the Society of Authors, that the criterion should be the persons to or among whom the matter was *intended* to be distributed, circulated or offered for sale, and, it is submitted, rightly so.

2. *The dominant effect of the work*

The Select Committee favoured the test of the dominant effect of the work, and believed that the courts usually acted on this principle, but they considered that the matter should be made clear in the new law. Section 1 incorporates the requirement that the work shall be taken as a whole. Section 1 also defines the term "article" and the notion of publication, for the purposes of the Act, and section 2 (1) creates the new offence of publishing an obscene article, to take the place of the misdemeanour of publishing an obscene libel at common law, which will no longer be available (s. 2 (4)).

3. *The defence of innocent dissemination*

Under the provisions of section 2 (5) a person shall not be convicted of an offence of publishing an obscene article if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it would make him liable to be convicted of an offence under this section.

This provision carries out the recommendation of the Select Committee, and affords a defence to booksellers and lending libraries similar to that available to them already under the Children and Young Persons (Harmful Publications) Act, 1955. It would also appear to apply to importers.⁷

4. *The defence of public good*

The test of literary or artistic merit of the work as a defence, which the Society of Authors suggested and the Select Committee accepted and recommended, finds expression in the Act in the guise of the defence of publication for the public good (s. 4). This defence applies alike to proceedings for publication of an obscene article under section 2 and to proceedings for forfeiture under section 3 (which, as we shall see below, now take the place of proceedings for a destruction order under the Act of 1857). "Public good" is defined as publication "in the interests of science, literature, art or learning, or of other objects of general concern." Stephen had formulated a similar defence in his *Digest*

⁷ Cf. the law of contempt of court, which has been criticised in the pamphlet by JUSTICE, *Contempt of Court*, 1959. Clause 11 of the Administration of Justice Bill (H.L. 59 of 1959-60) seeks to deal with this problem in terms very similar to those in the Obscene Publications Act, 1959.

of the *Criminal Law* many years ago,⁸ and it had been accepted in at least one case of a prosecution for the misdemeanour.⁹ Under the Act of 1857 the courts sometimes had this consideration in mind in dealing with proceedings for a destruction order. Now it is specifically laid down in the new law as an available defence (s. 4 (1)), and this is very satisfactory.

5. *Expert evidence*

Section 4 (2) provides that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under the Act, either to establish or to negative "the said ground." These last three words clearly link the admission of expert evidence with the previous subsection enacting the defence of publication for the public good. It would seem therefore that expert evidence is not available for any other purpose, for example, the prosecution could not call expert evidence to show the tendency to deprave and corrupt. This is a matter on which the jury or the bench must exercise their own judgment. But it is likely that in any case of doubt the defence would raise the defence of public good, and the matter would then be at large.

6. *Forfeiture orders—new procedure—who can appear*

The Act repeals the Obscene Publications Act, 1857, which provided the cumbersome procedure for destruction orders, and substitutes a new procedure for obtaining forfeiture orders (s. 3). In such proceedings it is expressly provided that not only shall the distributor be entitled to appear but "the owner, author or maker of any of the articles brought before the court, or any other person through whose hands they had passed before being seized" shall be entitled to appear to show cause why the articles should not be forfeited.

7. *Enlarged police powers of search and seizure*

The powers of the police have been enlarged in the following respects:

(i) Whereas previously in order to obtain a search warrant under the Act of 1857 the police had to swear that obscene articles had been sold, distributed, lent or otherwise published, now it is sufficient to satisfy a justice of the peace on sworn information that obscene articles are being kept for publication for gain.

(ii) Under a search warrant, the police will henceforth be entitled to seize not only any obscene articles found but also any documents found on the premises which relate to a trade or business there carried on. Similar powers already exist relating to

⁸ See J. F. Stephen, *A Digest of the Criminal Law* (9th ed. by L. F. Sturge, 1950), Art. 228, pp. 172-173.

⁹ *R. v. De Montalk* (1932) 23 Cr.App.R. 182 at 183.

other anti-social offences, and the Select Committee recommended this and the foregoing change.

(iii) Hitherto no powers existed under the Act of 1857 to obtain search warrants for stalls or vehicles. Following another of the Select Committee's recommendations, the new law extends to cover stalls or vehicles where obscene articles are kept for publication for gain.

8. *Heavier penalties*

The misdemeanour of publishing an obscene libel was punishable as a common law misdemeanour, which meant that no maximum fine or period of imprisonment was fixed by law. In future there will only be the statutory offence under section 2, and Parliament had to decide what penalties were appropriate. The penalties provided are slightly heavier than those recommended by the Select Committee, and are as follows:

- (a) on summary conviction a fine not exceeding £100 or imprisonment for a term not exceeding six months;
- (b) on conviction on indictment, a fine of unlimited amount or imprisonment not exceeding three years or both.

The Select Committee had recommended that the maximum imprisonment under (a) should be four months, and that the maximum fine under (b) should be £2,000.

Extent and effect of the changes

Mr. Roy Jenkins, M.P., has warned us that the extent of the advance which the Act has achieved should not be exaggerated. "The promoters of the Bill were far from getting all they wanted."¹⁰ Of the Select Committee's recommendations, the most notable omission is the proposal that the consent of the Director of Public Prosecutions be required for any proceedings. This was urged on the ground that only in this way could uniformity of standards of enforcement of this law be ensured. The police are already obliged to report to the Director any cases of obscene libel which they consider warrant prosecution, and the Director and his staff no doubt exercise considerable direct and indirect influence. But it seems a pity that in a matter of this nature, the opportunity was not taken to require consent of the Director before proceedings are taken. Another omission appears to be the power which the Select Committee proposed should be given to a trial court in proceedings for the misdemeanour to order the destruction of the articles in question, in the event of a successful prosecution. Apart from these omissions, the Act appears to incorporate all the Select Committee's recommendations. It remains to be seen what effect the new law will have in practice, and how it will be administered.

J. E. HALL WILLIAMS.

¹⁰ *Loc. cit.* note 1.

THE LEGITIMACY ACT, 1959—A MATTER OF PRINCIPLE

IN his note on the Legitimacy Act, 1959,¹ Professor Kahn-Freund points out that the common factor of many of its provisions is "to reduce the incidence of illegitimacy and also further to reduce the difference between the status of legitimate and illegitimate children."² This trend can be seen in other statutes,³ and, indeed, the judges themselves have not been slow to reflect the change in public opinion on this subject.⁴ However, it is the object of this note to deal with one aspect of the 1959 Act which was not touched upon by Professor Kahn-Freund but which will be thought by some people to be one of its most significant features.

Prior to the Legitimacy Act, 1959, if a custody dispute arose between the parents of an illegitimate child it could only be settled either on the mother's application in the Queen's Bench Division for a writ of habeas corpus or on the father's application in the Chancery Division for the child to be made a ward of court and for physical custody to be entrusted to him.⁵ As Professor Kahn-Freund points out in his note⁶ it will now be possible as a result of section 3 (1) of the 1959 Act for such a dispute to be settled under the Guardianship of Infants Acts, and, in particular, the cheap and speedy summary procedure provided by these Acts will be available to both parents without distinction. Hence procedurally the lot of both parents has been improved but how, if at all, has the new Act affected the principles governing such disputes?

Until the 1959 Act it seems tolerably clear that in a dispute as to the custody of an illegitimate child the mother could stand on

¹ (1960) 23 M.L.R., pp. 56-60.

² *Ibid.* p. 56.

³ See, e.g., the Matrimonial Proceedings (Children) Act, 1958, which, *inter alia*, gives the High Court power, in certain circumstances, to deal with the custody of the illegitimate child of one of the parties to a matrimonial dispute. The principles to be applied to such a dispute are not specified but presumably the plan put forward by the natural parent will generally prevail unless it is shown to be detrimental to the child's welfare in some very serious and important respect.

⁴ See, e.g., *Brock v. Wollams* [1949] 2 K.B. 388 (illegitimate child held to be a "member of the tenant's family" for the purpose of succeeding to a statutory tenancy under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920); *Galloway v. Galloway* [1955] 3 All E.R. 429 (the words "children the marriage of whose parents is the subject of the proceedings" in s. 26 (1) of the Matrimonial Causes Act, 1950, held to include an illegitimate child of the parties, thereby giving the Divorce Court power to deal with its custody, etc.); *Re D. (An Infant)* [1958] 3 All E.R. 716 (where it was held that the mother of an illegitimate child could adopt it on her sole application, thereby removing a number of the legal disadvantages of illegitimacy). But contrast *Re Makein (deceased)* [1955] Ch. 194, where it was held that the words "infant son" in s. 1 (1) of the Inheritance (Family Provision) Act, 1938, do not include an illegitimate child so as to enable him to claim on his father's estate. The Legitimacy Bill, as presented in the Commons, contained a clause which would have reversed this decision, but it was deleted during the passage of the Bill.

⁵ See, e.g., *Re A. (An Infant)* [1955] 2 All E.R. 202.

⁶ *Loc. cit.* p. 59.

her equitable rights⁷ irrespective of whether the other party to the dispute was a stranger or the child's father.⁸ Section 1 of the Guardianship of Infants Act, 1925, which makes the welfare of the child the first and paramount consideration in certain types of custody dispute, never appears to have applied to a dispute involving an illegitimate child. This meant that the plan proposed by the mother normally prevailed unless the party opposing it could show that such plan was detrimental to the child's welfare in some very serious and important respect.⁹ Thus, the father of an illegitimate child, who desired to obtain custody, was faced not merely with procedural difficulties but also with grave disadvantages on matters of substance.¹⁰ Has the 1959 Act done anything to remove these disadvantages and to give the father of an illegitimate child similar rights in relation to its custody as those given to the mother of a legitimate child by the Guardianship of Infants Acts, 1886-1925?

If the Legitimacy Act, 1959, had been accepted in the form it was presented to the House of Commons by its sponsors a satisfactory and categorical answer could have been given to this question since clause 3 provided that, "At the end of section one of the Guardianship of Infants Act, 1925, shall be added the words, 'For the purposes of this section the word "infant" shall include legitimate and illegitimate infants.' " Having regard to the width of the introductory words of section 1 of the 1925 Act¹¹ this would have meant that in any custody dispute between the parents of an illegitimate child, irrespective of the procedure chosen to settle it, the court would have been entitled to ignore the mother's equitable rights and give first and paramount consideration to the child's welfare. However, this clause does not appear in the Act which instead provides that¹²—

"Subject to the provisions of this section, the following enactments relating to the custody of infants, that is to say—

⁷ Modified sometimes by ss. 1 and 3 of the Custody of Children Act, 1891. Thus, *e.g.*, where she has allowed someone else to bring up her child for such a length of time and in such circumstances as to show that she was unmindful of her parental duties, the court is directed not to order the child to be restored to her unless *she* satisfies the court that, having regard to the welfare of the child (this is the sole criterion), she is a fit person to have its custody (see s. 3). This Act, which was designed to remove some of the terrors of *de facto* adoption, appears to have been largely forgotten since the introduction of statutory adoption in 1926, but it could provide a valuable weapon of defence in many of the tragic cases which from time to time appear in the Press.

⁸ See, *e.g.*, *Re G. (An Infant)* [1956] 2 All E.R. 876.

⁹ For the difference between the equitable welfare concept and its statutory counterpart, see *Re J. M. Carroll* [1931] 1 K.B. 317.

¹⁰ Moreover, even in the more limited sphere of access his stake was small, one judge having suggested that the general principle that it is in a child's interests to know both parents is not necessarily applicable in the case of illegitimate children (Lord Evershed M.R. in *Re G. (An Infant)* [1956] 2 All E.R. 876, at pp. 879-880).

¹¹ "Where in *any* proceeding before *any* court . . . the custody or upbringing of an infant . . . is in question. . . ."

¹² See s. 3 (1).

- (a) section five of the Guardianship of Infants Act, 1886 (which enables the court to make, on the application of the mother of an infant, orders regarding the custody of the infant and the right of access thereto of either parent); and
- (b) section sixteen of the Administration of Justice Act, 1928 (which enables the court to make orders under the said section five on the application of the father of an infant),

shall apply in relation to an infant who is illegitimate as they apply in relation to an infant who is legitimate, and references in those enactments, and in any other enactment so far as it relates to proceedings under the said section five, to the father or mother or parent of an infant shall be construed accordingly."

Whilst this subsection is an improvement on the original Bill in that it makes available to the parents of an illegitimate child the procedure provided by the Guardianship of Infants Acts for settling their custody disputes¹³ it is not quite so satisfactory when looked at from the point of substance. No doubt the words "any other enactment" include section 1 of the Guardianship of Infants Act, 1925, which has, since 1925, made the welfare of the child the first and paramount consideration in all custody disputes fought out under the Guardianship of Infants Acts.¹⁴ However, the words "so far as it relates to proceedings under the said section five" appear to confine the application of section 1 of the 1925 Act, so far as illegitimate children are concerned,¹⁵ to custody disputes fought out within the framework of the Guardianship of Infants Acts. Accordingly, the mother of an illegitimate child can apparently still preserve her equitable rights,¹⁶ even against the father, by applying for a writ of habeas corpus. It may be that history will in a perverse way repeat itself, and that we shall now see the judges of the Queen's Bench Division staying the mother's application for a writ of habeas corpus to allow the father time to invoke the new statutory jurisdiction of the Chancery Division.

That the principles relating to the custody of legitimate and illegitimate children should differ is at least understandable, but that the principles in relation to illegitimate children themselves should depend upon a matter of procedure is ridiculous and, probably, accidental. All this lends support for Professor Kahn-Freund's

¹³ Thereby reversing *Re C. T. (An Infant)* [1957] Ch. 48.

¹⁴ Prior to the 1925 Act such disputes were governed by the principles laid down in s. 5 of the 1886 Act, which directed the court to have regard "to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father."

¹⁵ So far as a legitimate child is concerned, s. 1 of the 1925 Act applies if the dispute is between his parents or between the respective sides of his family after the death of both his parents regardless of the procedure chosen to settle the dispute. See, e.g., *Re Collins (An Infant)* [1950] Ch. 498.

¹⁶ Modified, in some cases, by ss. 1 and 3 of the Custody of Children Act, 1891 (see note 7, *supra*).

plea for a general consolidation of the statute law on domestic relations.¹⁷ The piecemeal way in which this branch of our law is at present developing leads to considerable confusion,¹⁸ and makes the subject extremely difficult to teach.¹⁹

D. L. BULMER.

¹⁷ *Op. cit.* p. 56.

¹⁸ Thus, *e.g.*, s. 12 (1) of the Adoption Act, 1950, which provided that an affiliation order should cease to operate if the mother of the child, having adopted it on her sole application, subsequently married, completely ignored the National Assistance Act, 1948, which abolished a step-father's financial responsibility for his step-children (the position has now been righted by the Adoption Act, 1958). Again, valuable time is being wasted by Committees considering recommendations for changes in the law when there is already an existing enactment to deal with the point (see para. 191 of the Report of the Departmental Committee on the Adoption of Children, and for the existing statutory provision, see s. 2 of the Custody of Children Act, 1891).

¹⁹ This is especially true of the law relating to children which frequently has to be taught to social workers with little general background in the law and little time at their disposal. The principles relating to custody are particularly confusing to them yet they are so fundamental since most of the statutes with which they will eventually come into contact daily modify these principles to secure more room for the courts to advance the welfare of children.

TREATIES

THE FREE TRADE ASSOCIATION AND THE COMMON MARKET COMPARED

It is not easy to introduce free trade among a group of countries, and before any treaty can be drawn up the countries concerned must be very clear about what exactly it is that they wish to achieve. Shall the treaty merely lower tariffs between the member states, or shall it in addition establish a common external tariff in relation to third countries? Shall the treaty merely create free trade, or should it also create some form of political union between the member states? Is the treaty to be a tentative step, from which any party can withdraw, or shall the arrangement be permanent and irrevocable?

To these three questions the European Free Trade Association¹ and the European Common Market,² the Seven and the Six, have each given different answers. When completely carried into effect, the Free Trade Association Treaty will end "internal" tariffs and quotas, that is to say the obstacles to free trade between the members of the Association, but it will still leave each of those members quite free to regulate its trade with outside countries as it pleases. The Common Market, on the other hand, will eventually be surrounded by a common external tariff against all non-member states, including, of course, all of the Seven. The Free Trade Association Treaty merely ends tariffs between sovereign states, the Common Market goes further and creates a community of nations, with a political structure, a parliament and a court: any party can withdraw from the Free Trade Association,³ no party can withdraw from the Common Market Community.

In the light of this, it may be of value to compare the solutions of these two free trade agreements to the problems of introducing free trade.

Problems to be solved

To bring about free trade, one must, of course, first decide the countries between which it is to occur, and then in respect of what goods. This done, various obstacles have to be removed.

First, a state must no longer be able to limit the quantity of the free trade goods coming in, or to impose import duties upon them and, once in the country, the goods must not be treated in

¹ Text of Convention and other documents, H.M.S.O., Cmnd. 906, price 3s.

² Treaty establishing the European Economic Community, H.M.S.O., price 10s.

³ European Free Trade Association Treaty, Art. 42. This is done merely by giving twelve months' notice in writing to the Government of Sweden: *ibid.*

any way differently from home produced goods. Secondly, and as a converse to this, duties must not be placed upon exports, nor must state subsidies within the country assist goods destined for export more than they assist goods for home consumption.

With this go the problems of unemployment, of monopolies and restrictive practices, and finally, and the most important from the lawyer's point of view, the administrative machinery and the legal means of preventing evasions.

The Solution of Free Trade Association

The Free Trade Association is an agreement between seven states.⁴ It expressly does not cover agricultural products,⁵ except that these are not to be subsidised so as to damage the interests of other member states,⁶ and provisions concerning fish have not yet been drawn up.⁷ With these exceptions, the Agreement broadly covers all goods wholly or for the greater part produced within one of the member states.⁸

When, in 1959, goods were imported into one member state from another under a quota specifying the amount that might be so imported, that amount must be increased by at least 20 per cent. on July 1, 1960,⁹ and by at least the same amount annually until the quota ceases to exist.¹⁰

Import duties are all to be eliminated by January 1, 1970,¹¹ unless an earlier date has been decided upon.¹² This elimination is, however, to be gradual, the first reduction to be made on July 1, 1960, being of 20 per cent. of the duty as it was on January 1, 1960.¹³ If, however, these reductions cause an appreciable rise in unemployment due to a substantially decreased demand for the

⁴ Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

⁵ Art. 21, para. 1.

⁶ Art. 24, para. 1.

⁷ Art. 28. An examination into arrangements to govern the trade in fish is to begin before January 1, 1961, and be concluded before January 1, 1962: Art. 28.

⁸ Art. 4, para. 1. To obtain the advantages of the Treaty, goods are required to be accompanied either by a declaration of origin completed by the last producer of the goods within the Free Trade Area, or by a certificate of origin given by a government authority or authorised body nominated by the exporting member state: Annex B, Rule 8, para. 1. The form this documentary evidence is to take is set out in Annex B, Schedule IV, published separately from the Treaty: Cmnd. 906—I.

⁹ Art. 10, para. 1.

¹⁰ Art. 10, para. 7. If, however, compliance with these provisions would cause "serious difficulties," alternative arrangements can be authorised: Art. 10, para. 8. Quantitative restrictions can at any time be reimposed for the purpose of safeguarding a state's balance of payments: Art. 19, para. 1.

¹¹ Art. 3, para. 2 (b).

¹² Art. 3, para. 5.

¹³ Art. 3, para. 2 (a). Thereafter further reductions, each of 10 per cent., are to be made on January 1, 1962, July 1, 1963, and thereafter on January 1, annually, until 1970: Art. 3, para. 2 (a). Each state has declared its readiness to reduce these duties at a quicker speed if its financial position, etc., allow: Art. 3, para. 4.

home-produced product, the member state concerned may be authorised by the Council to lower import duties at a different rate,¹⁴ but even so the final elimination must still be by January 1, 1970.¹⁵

Once foreign goods have entered a country, the state concerned shall not impose upon them any purchase tax or similar charges not imposed upon similar domestic goods.¹⁶

Export duties are to be ended at a much faster rate and all will be illegal by January 1, 1962.¹⁷

Government subsidies to exporters, as well as all other less obvious assistance to the export trade, such as a bonus upon exports, or a remission of purchase tax, are all declared illegal immediately.¹⁸

The problem of possible unemployment is not dealt with in the treaty, except to the extent that has been noticed above, whereby a state may be authorised to delay its gradual elimination of quotas if an increase of foreign goods is the cause of the unemployment. Apart from this, the state must solve its own problems of retraining, rehousing and re-equipping, for, whatever the level of unemployment, all import duties must be eliminated by 1970.

All monopolies and restrictive practices are declared to be incompatible with the treaty.¹⁹ If a member state considers that free trade is being prevented as a result of the existence of any of these, in default of a settlement, the case may be referred to the Council,²⁰ whose powers in this matter are set out below.

Each state is to be represented on this Council and is to have one vote.²¹ The number of representatives of each state is not specified in the treaty, and there is no requirement that the representatives should be appointed for any particular period of time. This may well prevent any corporate feeling being established among the representatives.

The functions of the Council are both political and judicial. It is to decide such matters as whether a state may delay its reduction of import duties,²² and for what period of time a state may

¹⁴ Art. 20, para. 4.

¹⁵ The only exception to this is the case of Portugal, whose import duties are only to be reduced by 50 per cent. by 1970 and are only to be finally abolished by January 1, 1980: Annex G, I, paras 4 (a) and 6 (c).

¹⁶ Art. 6, para. 1 (a). Where there are no similar domestic goods, the purchase tax, etc., must not exceed that imposed upon goods which may be substituted for those imported: Art. 6, para. 1 (b).

¹⁷ Art. 8, para. 1.

¹⁸ Art. 13, para. 1, and Annex C. A state, however, still has the right to restrict exports of artistic treasures and gold, and to make provisions governing public morals and public health: Art. 12.

¹⁹ Art. 15, para. 1. Monopolies and restrictive practices are not rendered automatically void by the treaty, but a member state which allows them to continue is in breach of the treaty and may be cited before the Council by another member state.

²⁰ Art. 31, para. 1.

²¹ Art. 32, para. 2.

²² Art. 20, para. 4.

retain its reimposed quantitative restrictions.²³ It is also to the Council that any member state may appeal if it considers that another member state is not fulfilling all its duties under the treaty, including its duty to abolish monopolies and restrictive practices.²⁴ If such an appeal should be made, the Council can refer it to an examining committee²⁵ which is to be an *ad hoc* body of an unspecified number of persons selected for "their competence and integrity."²⁶ In the light of their report and of its own opinions on the matter, the Council, by a majority vote,²⁷ may make such recommendations as it considers appropriate.²⁸

If this recommendation is not obeyed, the Council, again by a majority decision, may as a sanction authorise the other member states to reimpose import duties and restrictions.²⁹ The defaulting state can then, as at any other time if it so wishes, give one year's notice and withdraw from the agreement altogether.³⁰

The Solution of the Common Market

The six countries of Europe³¹ which had already in 1951 adopted free trade in coal and steel,³² have decided to extend it to all other goods as well,³³ whether wholly produced in a member state or incorporating products produced in countries outside the community.³⁴ However, unlike in the case of the Seven, this free trade includes agricultural goods and fish.³⁵ It also includes services, such as transport and banking, and artisan and professional activities,³⁶ the right to set up business in other member states,³⁷ to move capital freely³⁸ and, finally, the right for workers to move freely from one member state to another.³⁹

Where in 1958 a member state had a quota as respects goods from another member state, this quota was to be granted to all the other member states and in January 1959 was to be increased by 20 per cent. and thereafter annually by the same amount.⁴⁰

²³ Art. 20, para. 1 (b) (i).

²⁴ Art. 31, para. 1.

²⁵ Art. 31, para. 1. The matter shall be so referred at the request of a member state: Art. 31, para. 2.

²⁶ Art. 33. It is not clear whether the term "competence" implies that they must be lawyers.

²⁷ The accused state has the right to vote on this matter.

²⁸ Art. 31, para. 3.

²⁹ Art. 31, para. 4.

³⁰ Art. 42.

³¹ France, Western Germany, Italy, Belgium, the Netherlands and Luxembourg.

³² Treaty establishing the European Coal and Steel Community.

³³ European Economic Community Treaty, Art. 9, para. 1.

³⁴ This is possible because the six countries are to adopt a common customs tariff towards non-member countries: Art. 3 (b).

³⁵ Art. 38, para. 1.

³⁶ Art. 60.

³⁷ Art. 52, para. 2.

³⁸ Art. 67, para. 1.

³⁹ Art. 48, para. 1.

⁴⁰ Art. 33, para. 1.

Import duties are calculated in relation to the duty as it existed on January 1, 1957. The aim is that this duty shall have been reduced by 25 per cent. by the end of 1962, and by 50 per cent. by the end of 1966, and be finally eliminated by the end of 1970.⁴¹

As under the Seven Treaty, export duties are to be removed much more rapidly, that is to say, by the end of 1962,⁴² but, as already mentioned, unlike in the case of that treaty, the Six are to impose a common tariff against non-member states,⁴³ which is basically to be the average of the various tariffs existing on January 1, 1957.⁴⁴

Government subsidies which distort competition by favouring certain enterprises so as adversely to affect trade between member states are made illegal,⁴⁵ and so are any discriminations against the transporting of foreign goods once they are within a member state.⁴⁶

Whereas the Free Trade Association Treaty has no policy to deal with unemployment, the Common Market Community has. A European Social Fund has been established into which the member states pay an annual contribution decided by themselves.⁴⁷ This fund can grant up to 50 per cent. of the cost of occupational retraining and resettlement allowances, and of the cost of granting aids to maintain a worker's wages at the same level as previously until he can be fully re-employed.⁴⁸

In addition to this, an Investment Bank has been set up, with capital provided by the six member states of the community.⁴⁹ The Bank is empowered to grant loans and guarantees on a non-profit-making basis to facilitate the financing of projects to help less developed regions, to assist the modernising and converting of enterprises and the creating of new activities.⁵⁰

⁴¹ Art. 14, paras. 2 and 6. Certain latitude is allowed in this matter, but whatever occurs the import duties must all be eliminated by the end of 1973: Art. 8, para. 6.

⁴² Art. 16. This date may, however, be extended by one year: Art. 8, para. 3.2.

⁴³ Art. 3 (b).

⁴⁴ Art. 19, paras. 1 and 2. There are many exceptions to this, however, on which duties are to range from 3 to 25 per cent.: Annex I, Lists A-E.

⁴⁵ Art. 92, para. 1.

⁴⁶ Art. 79, para. 1.

⁴⁷ The percentage contributions of the member states are: France and West Germany 32, Italy 20, Belgium 8.8, Netherlands 7 and Luxembourg 0.2: Art. 200, para. 2. In deciding upon the amount of the annual contribution the voting strength of the states is: France and West Germany 32 each, Italy 20, Belgium 8, Netherlands 7 and Luxembourg 1. At least 67 votes are required for a proposal to be adopted: Art. 204, para. 5.

⁴⁸ Art. 125, para. 1. The fund is administered by the Commission assisted by a Committee composed of representatives of governments, trade unions and employer's associations: Art. 124, para. 2.

⁴⁹ The states' contributions are measured in units, each unit representing the value of 0.88867088 grammes of fine gold. The contributions are: Germany 300m., France 300m., Italy 240m., Belgium 86.5m., Netherlands 71.5m. and Luxembourg 2m. of these units: Protocol on the Statute of the European Investment Bank, Art. 4, para. 1. 25 per cent. of the contributions are to have been paid by July 1, 1961: *ibid.* Art. 5, para. 1.

⁵⁰ Art. 130.

Actions by monopolies, such as limiting production or imposing inequitable selling prices, are declared incompatible with the Treaty,⁵¹ as also are agreements between enterprises fixing prices or limiting production.⁵² Regulations to prevent any of the above from occurring and to enable fines and penalties to be imposed upon offenders are to be drawn up.⁵³ However, until these have been drawn up, prevention of any of these practices is left both to the member states themselves, acting in accordance with their own municipal laws,⁵⁴ and also to the Commission which can itself investigate any suspected breaches of the Treaty and can issue a decision binding upon member states.⁵⁵

The administration of the Free Trade Association is given over to a Council: that of the Common Market is shared among many bodies.

First, there is a Commission of nine members appointed by the governments of the member states for a period of four years.⁵⁶ Its task is very largely advisory, and is mainly limited to preparing and submitting proposals to the Council of Ministers which consists of one member of the government of each of the member states.⁵⁷ It is this Council which decides such matters as how to achieve a common agricultural policy,⁵⁸ how to ensure the free movement of workers, and how to co-ordinate the states' laws concerning foreign nationals, public safety and public health.⁵⁹

Together with these, the Common Assembly, consisting of parliamentary delegates of the six states, first set up under the Coal and Steel Community Treaty, has been doubled in number and now consists of 142 persons.⁶⁰ Proposals are to be drawn up for the members to be elected by direct universal suffrage.⁶¹

This "parliament" can censure the members of the Commission and thus force them to resign,⁶² and it must also be consulted on many matters including the drawing up both of a common agricultural policy⁶³ and of provisions to prevent price fixing and restrictive practices,⁶⁴ and before the granting of moneys from the European Social Fund.⁶⁵

⁵¹ Art. 86 (a) and (b).

⁵² Art. 85, para. 1 (a) and (b).

⁵³ Art. 87, para. 1.

⁵⁴ Art. 88.

⁵⁵ Art. 89, para. 1. For breach of the obligations imposed upon a state, it can be cited before the court by another member state: Art. 170.

⁵⁶ Arts. 157, para. 1, and 158.

⁵⁷ Art. 146, para. 1.

⁵⁸ Art. 43, para. 2.

⁵⁹ Art. 56, para. 2.

⁶⁰ Art. 138, paras. 1 and 2. Representation is: Germany 36, France 36, Italy 36, Belgium 14, Netherlands 14 and Luxembourg 6: *ibid.*

⁶¹ Art. 138, para. 3.

⁶² Art. 114, para. 1.

⁶³ Art. 43, para. 2.

⁶⁴ Art. 87, para. 1.

⁶⁵ Art. 127.

The Investment Bank, to assist development, is run by a board of governors consisting of Ministers appointed by the member states,⁶⁶ a board of twelve directors and a management committee both appointed by the governors.⁶⁷

However, the most important and far-reaching of the provisions in the Common Market Treaty are those that give over the control of the Community into the hands of the court that was first set up under the Coal and Steel Community and which has now been reconstituted as the Court of the European Communities.⁶⁸ In its earlier form, this court has been in existence since 1953 and has to date delivered nearly forty judgments. It has direct jurisdiction over the member states for breaches of the treaty and its jurisdiction over the administrative acts of the Commission and the Council of Ministers is very similar to that exercised by the Conseil d'Etat in France.

The two treaties, therefore, have attempted to solve the problems of free trade in two entirely different ways. The one being a revocable agreement between sovereign states to end their trade barriers in respect of certain goods: the other being an irrevocable agreement between states, which are no longer to be fully sovereign, aiming to end their trade barriers in respect of all goods, services and capital. The one leaves the inevitable unemployment and redevelopment to be dealt with by member states as best they can, the other, seeing these as a major problem, arranges compensation and provides large funds for investment.

D. G. VALENTINE.

⁶⁶ Art. 9, para. 1.

⁶⁷ Art. 11, para. 2, and Art. 13, para. 1.

⁶⁸ That is, the Coal and Steel, Common Market and Euratom Communities.

NOTES OF CASES

TAKING PROPERTY

THE decision of the House of Lords in the *O. D. Cars* case¹ is one of considerable importance to public authorities and practitioners in Northern Ireland, and it is not without interest to lawyers in other jurisdictions who are interested in the basic conceptions of the law. The case was the first opportunity given to the ultimate court of appeal to express an opinion on the concluding words of section 5 (1) of the Government of Ireland Act, 1920—"or take any property without compensation." These six words have been the subject of keen dispute in Northern Ireland over the past twenty years.

Section 5 (1) of the Government of Ireland Act, 1920, is mainly directed to invalidating any law of the Parliament of Northern Ireland which directly or indirectly interferes with religious equality. Indeed, all but these six concluding words are so clearly referable to instances of discrimination on religious grounds that there was an arguable case for giving the concluding words an *ejusdem generis* construction, but this argument was rejected by the Northern Ireland Court of Appeal in *O'Neill v. N. I. Transport Board*² in 1938, and in the *O. D. Cars* case the Lords decided that *O'Neill's* case was rightly decided.³

Between 1938 and 1959 these words had been considerably discussed on several occasions in connection with Northern Ireland's nationalised road transport system.⁴ The discussions have centred on the words "property" and "take." There is no doubt that the word "property" covers all normal interests in land and chattels. It is also pretty clear that it covers certain types of choses in action which are accepted as "property" on the empirical ground that they are the subjects of commercial dealings: such are goodwill, patents, copyright, stocks and shares, insurance interests and the like. Indeed, in *Ulster Transport Authority v. Brown and Sons*,⁵ the Court of Appeal in Northern Ireland accepted that goodwill was "property" for the purpose of section 5 (1). In *Brown's*

¹ [1960] 2 W.L.R. 148; [1960] 1 All E.R. 65.

² [1938] N.I. 104.

³ The explanation of the placing of these six words at the end of a subsection otherwise devoted to matters religious is to be found in the parliamentary history of the Act. The original Bill submitted to Parliament did not contain these words. They were added by amendment in the House of Commons, which thought that all kinds of property should be protected against a taking without compensation, and the words were put at the end of s. 5 (1) for the want of anywhere else to put them.

⁴ All passenger and freight services in Northern Ireland, with minor exceptions, were nationalised in 1935.

⁵ [1953] N.I. 79.

case it had been further argued that the right to exercise a trade was itself "property," but though this view found favour with one judge in the Divisional Court the Court of Appeal declined to decide the case on that ground.

The word "take" has provided even keener discussion. "Take" is an ambiguous word at the best of times for it can clearly mean a mere deprivation and equally clearly mean an appropriation. Shakespeare appreciated the difference:

"Who steals my purse, steals trash: 'tis something, nothing;
'Twas mine, 'tis his . . .
But he, that filches from me my good name,
Robs me of that, which not enriches him,
And makes me poor indeed."⁶

In the *O. D. Cars* case the argument moved from the sphere of road transport to that of town planning. The respondents who carried on business as motor engineers proposed to erect further buildings on their land and accordingly applied for permission to the Belfast Corporation as interim development authority under the Planning (Interim Development) Act (Northern Ireland), 1944. Permission having been refused, the respondents claimed compensation for injurious affection. The 1944 Act entitled applicants to whom permission was refused such compensation for injurious affection as they would be entitled to under the Planning and Housing Act (Northern Ireland), 1931, but section 10 (2) of this latter Act had provided that property should not be deemed to be injuriously affected by certain specified classes of provisions in a planning scheme "which the Ministry . . . considers reasonable for the purpose."

As the reasons given for the refusal of planning permission to the respondents related to matters within the specified classes set out in section 10 (2) of the 1931 Act, and as the Ministry had decided that they were reasonable,⁷ it was clear that the respondents must be denied compensation unless they could attack the legislation as *ultra vires* the Parliament of Northern Ireland, and this they proceeded to do by asserting that the refusal of planning permission unaccompanied by compensation was a taking of property without compensation.

That the respondents had lost what Lord MacDermott C.J. described as "certain proprietary rights of value" was evident, and the Court of Appeal was satisfied that there had been a taking of property from the respondents, but the court then proceeded to distinguish. A prohibition or restriction which is imposed merely to prohibit or restrict, or as a device for getting something for nothing, is invalid under section 5 (1) of the 1920 Act. But "truly regulatory legislation which is passed in the public interest and is

⁶ *Othello*, Act III, scene iii.

⁷ A subordinate question in the case was whether the Ministry's decision on reasonableness had been properly proved.

not aimed at taking property without compensation need not constitute a breach of section 5 (1) even though it entails some degree of taking without compensation." One might have expected from this conclusion that town planning legislation would come under the head of "regulatory" takings, and that would be the end of the matter. But the Court of Appeal went further and laid down that the test of whether a taking of property was a "regulatory" taking was (i) Is the legislation directed in its substance to furthering the public interest? and (ii) Are the restrictions reasonable and proper for that purpose? The legislation under scrutiny clearly satisfied the first test; but it came to grief on the second, not on the ground of unreasonableness in the particular application, but on the ground that the question of reasonableness fell to be determined by the Ministry and not by the courts. The issue of reasonableness was a necessary element in determining whether there was a "taking of property without compensation" contrary to section 5 (1) of the 1920 Act, and therefore a necessary element in determining the constitutional validity of the 1931 Act. But Lord MacDermott C.J. delivering the main judgment in the Court of Appeal took the view that the 1920 Act had committed the determination of the validity of Northern Ireland statutes to the courts, and therefore it followed that any justiciable issue on which that validity depended must likewise be determined by the courts.

The House of Lords upheld the appeal of the Belfast Corporation. On the construction point it was held that a restriction in the way of town planning on the right of a landowner to use his land in a particular way was not a "taking of property," and this conclusion was justified, partly by an appeal to "anyone using the English language in its ordinary signification," and partly by consideration of the fact that to hold otherwise would be to debar the Parliament of Northern Ireland from legislating in a large number of fields where it is generally assumed that the rights of the individual must give way to the general good. This result is no doubt very satisfying to many people, and has probably eased the life of the Northern Ireland parliamentary draftsmen,⁸ but the means by which it was arrived at must perplex many lawyers.

To appeal, as did Lord Simonds, to "anyone using the English language in its ordinary signification" is to press-gang our old friend, the man on the Clapham omnibus, into the business of statutory interpretation, where a good many surprises await him. Much may depend on the type of legislation one is dealing with. In construing a Betting Act the man-from-Clapham's opinion on the

⁸ The Northern Ireland parliamentary draftsmen have perfected a device for minimising the effect of s. 5 (1) of the 1920 Act in the case of property interests created by new legislation. By s. 32 of the Interpretation Act (Northern Ireland), 1954, any power, privilege or advantage accorded to any person by a Northern Ireland enactment subsequent to January 1, 1955, confers on the person to whom it is accorded no more than a determinable interest which cannot survive the repeal of the enactment.

meaning of "ante-post betting" might be illuminating, but in construing a constitutional Act, which may be regarded as being addressed to lawyers, he has neither the historical background nor the legal knowledge to enable him to make a useful contribution. Lord Simonds was confident that "anyone using the English language in its ordinary signification . . . would deny that any one of the rights which in the aggregate constitute ownership of property could itself and by itself aptly be called property." It is true that United States judges speak the English language with a strange accent, often interlarded with Americanisms, but generally they may be said to use it in its ordinary signification as understood among lawyers, and they have frequently asserted that any one of the rights which in the aggregate constitute ownership of property is itself property.⁹

Then there is some doubt whether in the *O. D. Cars* case the House of Lords held that the respondents' interest was not "property," or whether it was held to be "property" but not "taken." Though Lord Simonds' words quoted in the preceding paragraph seemed clearly to indicate that the interest was not "property," he also added (being so advised by the man from Clapham) that there was not a "taking."¹⁰ On the other hand, Lord Radcliffe merely expressed the view that there was no "taking." We get no help from the other Law Lords present, as Lord Cohen expressly agreed with both speeches and Lord Keith of Avonholm agreed generally.

Unfortunately their lordships did not travel beyond the case in hand. In ultimate courts of appeal it is desirable, and especially so in constitutional cases, that the court shall give as much guidance as possible. But nothing was said about *Brown's* case (*supra*) or the abortive case of *N. I. Road Transport v. Benson*.¹¹ The *O. D. Cars* case amounts to no more than this: "Restrictions imposed under planning legislation are not a taking of property." But what is "planning?" Its association with the user of land is evident enough, but whether it applies to a planned co-ordination of industry, as in the *N. I. Transport Board* cases, is still a question at large. Nor is there a great deal of light shed on the meaning

⁹ "Where an owner is deprived of the right to expose for sale and sell his property, he is deprived of property" (Cartwright C.J. in *Chicago City v. Notcher* (1872) 183 Ill. 104); "If the right of indefinite user is an essential element of absolute property, whatever physical interference annuls this amounts to a right to take property" (Smith J. in *Eaton v. Boston R. R.* (1889) 51 N.H. 504); "The right of [the appellant] to devote its land to any legitimate use is property within the protection of the Constitution" (Butler J. in *Seattle Title Trust Co. v. Roberge* (1928) 278 U.S. 116).

¹⁰ On the other hand, in a later part of his speech Lord Simonds observed that there might be legislation which was *ex facie* regulatory but in substance confiscatory, and consequently invalid under s. 5 (1) of the 1920 Act.

¹¹ Abortive because the House of Lords held in *Benson v. N. I. Transport Board* [1942] A.C. 520 that the whole of the appellate proceedings were misconceived, and therefore the decision of the Court of Appeal in Northern Ireland sinks to the level of extra-forensic dicta by distinguished lawyers.

of "property" in contexts other than those of planning legislation. Lord Simonds's "ordinary signification" test suggests a restriction to the right of ownership in a material object. But, really, we have got beyond the three-acres-and-a-cow era when people could see property only in the form of tangible land and tangible chattels. A constitutional prohibition against confiscatory legislation is mocked if no account is to be taken of the newer forms of proprietary interests which modern society has developed. What has been called "site goodwill" and "adherent goodwill" have been recognised by the courts as proprietary interests, yet they are the forms of property most likely to be taken in the course of planning legislation.

On that aspect of the case which really determined the decision of the Court of Appeal in Northern Ireland—the unconstitutionality of committing the test of reasonableness to the Ministry—the House of Lords decided that the view of the Court of Appeal was erroneous. Lord Radcliffe took the view that as it would have been *intra vires* the Parliament of Northern Ireland to have excluded compensation for injurious affection in all cases, it could not be *ultra vires* to permit compensation in some cases according to the decision of the Ministry on reasonableness. On the other hand, Lord Simonds approached it from the standpoint that the decision on reasonableness was an administrative function, possibly involving questions of policy, and that there was no theoretical objection to such a function being committed to the executive, though any particular exercise of that function might be attacked in the courts. As Lords Cohen and Keith were merely shouting general encouragement to their noble brethren from the touchline we are left without a majority reason for the holding on this aspect of the case.

In conclusion it may be observed that the Members of the House of Lords appeared to be unduly swayed by what they regarded as the awful consequences of holding otherwise than they did. In fact, the consequences would not be so dreadful, for the prohibition in section 5 (1) is not one against taking property, but against taking property without compensation. Once it is clear that the proposed legislation will deprive the individual of a legitimate economic interest which he has enjoyed there seems no reason in point of justice why he should not be compensated.

F. H. NEWARK.

TEN MINUTES TO DECIDE

Mr. Justice Stable's statement to the jury in *McKenna's* case¹ that it would be kept for the night if it did not arrive at a conclusion within ten minutes has been so strongly and widely criticised that it hardly warrants any further comment. Yet, whilst recognising

¹ Reported *sub nom.* *R. v. McKenna*, *R. v. McKenna*, *R. v. Busby* [1960] 1 All E.R. 326; [1960] 2 W.L.R. 306.

that the statement did obvious disservice to the cause of justice, one can at the same time express some sympathy for a judge of remarkably liberal reputation whose patience was, apparently, sorely tested by a singularly difficult jury. Although delay is part of the price paid for the jury system and particular allowance has always to be made in this country for the requirement of a unanimous verdict, the jury in *McKenna's* case appears from the report to have been extraordinarily slow. Whilst this is hardly a justification for the learned judge's statement, it does represent a mitigating factor to which the Court of Criminal Appeal rightly gave some prominence.

Although there is little recent authority on the point, and the court, indeed, appears to have cited no authority in its judgment, it has long been accepted that a jury must reach its decision free from coercion, "uninfluenced by any promise, unintimidated by any threat." To threaten a jury with hours of personal inconvenience and discomfort is an obvious denial of that freedom and, in the circumstances, the Court of Criminal Appeal was bound to quash the convictions: the jury had given no indication that it was agreed about the guilt of two of the three accused whose defences might, perhaps, have appeared "fanciful" to a lawyer. The court, therefore, declined to resort to the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and uphold any of the convictions on the grounds that "no substantial miscarriage of justice had actually occurred." Equally, the statement could hardly be said to have rendered the trial a nullity and the court refused to order a *venire de novo*.

The notoriety of the case is itself some indication that flagrant intimidation of juries is extremely rare in this country. Yet, whilst English juries are, it would seem, almost invariably given complete freedom to deliberate, instances of immoderate pressure being exerted by a judge over a jury, less directly than in *McKenna's* case, are not entirely unknown, and it would be wrong to deny that some judges in the not so distant past acquired a reputation for browbeating juries. Indeed, if the case comes as a reminder to some of the more forceful judges of the limits on their discretion in directing juries, it will have deserved some of its notoriety.²

S. PREVEZER.

RECOGNITION DISPUTE AS A "TRADE DISPUTE"

THE respondent company in *Beetham v. Trinidad Cement, Ltd.*,¹ employed 300 to 500² men in a factory in Trinidad. The Federated

² The case also makes the point, which is rarely mentioned in the textbooks, that a person can be guilty as an accessory after the fact for assisting the principal felon by himself assisting an accessory after the fact to the same felony.

¹ [1960] 2 W.L.R. 77. (Now reported at [1960] A.C. 132.) ² See next page.

Workers' Trade Union had been successful in organising 100 to 200 ² of these men. The attitude of the company management towards union intervention in its labour relations was hostile.

Two workmen, both union members, were dismissed and asked the union to mediate between themselves and management; but the union's approaches to the latter were ignored. The union then sought the good offices of the Commissioner for Labour. The Commissioner was rebuffed. The Minister of Labour intervened, but to as little avail.

At this point, the basis of the difference between union and company, originally confined to the question of *ad hoc* recognition of the union for the purpose of acting on the dismissed men's behalf, was immeasurably widened. The union wrote to the company claiming general recognition to bargain on behalf of the company's manual workers. This claim was communicated to and approved by the Trinidad Cement branch of the union. Again the union's letter was ignored, again the Commissioner of Labour was asked by the union to conciliate, and again was rebuffed by the company. This time, however, the Commissioner immediately reported the situation to the Governor of Trinidad, Sir Edward Beetham, who, on the same day, appointed a board of inquiry.

The Governor's power to make the appointment rested on the Trade Disputes (Arbitration and Inquiry) Ordinance, 1950, of Trinidad and Tobago, which provides that, "Where any trade dispute exists," the Governor may refer any matters connected with it to a board of inquiry. "Trade dispute" is defined in the Ordinance as (*inter alia*) "any dispute or difference between employers and workmen . . . connected with the employment or non-employment . . . of any person." The definition as a whole is substantially identical with that in the Trade Disputes Act, 1906.

Before the inquiry could proceed, its validity was challenged successfully in the West Indian courts on the ground that there was at the relevant time no "trade dispute" between company and union. The Governor appealed to the Judicial Committee of the Privy Council, who dealt with the issue on the footing that the dispute between company and union concerned the general recognition of the union as bargaining agent for its members employed by the company.

In deciding the issue in *Beetham's* case, three questions had to be answered:

(1) Was the recognition dispute one between the employer and his workmen, as the West Indian Ordinance and Trade Disputes Act, require? Held: it was. It is important to note that the

² The rough nature of the figures in the report may well be due, in the case of the company's labour force, to a high turnover of casual labour, and, in the case of union membership, to that inadequacy of union administration which is always a feature of nascent (or, indeed, established but weak) trade union movements.

workmen need not initiate their dispute, provided it can be shown, as here, that they gave their approval to their union's initiative.

(2) There may have been a difference between the employer and his workmen about recognising the union, but was there a "dispute"? The Ordinance refers, of course, to any dispute "or difference" (unlike the Trade Disputes Act), but in accordance with the terms of the appointment of the board of inquiry by the Governor, the Judicial Committee dealt with this question on the basis of the need to show not merely a "difference," but a "dispute." In the event, it was held in effect that the inclusion of "difference" was superfluous, that a difference is simply a dispute in embryo.

"By definition a trade dispute exists wherever a 'difference' exists; and a difference can exist long before the parties become locked in combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening. And . . . the parties had reached that point here, even in regard to the claim for bargaining status."³

(3) Was the dispute between the employer and his workmen "connected with the employment or non-employment of any person"? This question was not answered explicitly by the Judicial Committee, who held simply that the recognition dispute was a "trade dispute," which the Governor was therefore empowered to refer to a board of inquiry.

In supporting those institutions created for the purpose of fostering legitimate trade unionism and the evolution of orderly and equitable labour relations,⁴ the Judicial Committee's advice marks an important lead in the wise development of labour law among the newly emerging nations of the Commonwealth.

Its conclusions are also of great interest and significance for the collective labour law of the United Kingdom itself. In particular, there has not previously been a U.K. decision (or dictum) on whether the Trade Disputes Act covers a recognition dispute. A dispute about the parties to the bargaining process itself is clearly not a dispute "about" the terms and conditions of employment or the employment or non-employment of any person. But, the word "about" is not used in the Trade Disputes Act or the West Indian Ordinance, which employ the phrase "connected with."

As already mentioned, *Beetham's* case did not discuss expressly the scope of the vital phrase. It can only be said, therefore, to be an authority *sub silentio* that a recognition dispute is "connected with" the terms and conditions of employment of workmen as with

³ At pp. 83-84.

⁴ The difficulties of doing this in the earlier phases of social and economic development is underlined by the depressing sequel to the dispute at the Trinidad Cement Works, where the union branch members became impatient with the delay and, feeling there was no use in belonging to the union if they could get no immediate results, stopped paying their subscriptions; and so the branch died.

a workman's employment or non-employment. But, though not a binding precedent, nevertheless, as the only case in this field, it has the persuasive force of uniqueness and involves in principle a sound interpretation of the statutory definition in the context of the requirements of British labour relations.

C. GRUNFELD.

A LIMITATION ON EXECUTIVE POWER

THERE must be something in the woes of schoolboys which the law finds peculiarly appealing to its sense of justice. Half a century ago, the celebrated Mr. Archer-Shee, battling on behalf of his son, put the Admiralty to flight and forced the Crown to surrender, for a brief moment, its prerogative claims to stand outside the law. Now, once again, a father has taken up the cudgels on behalf of his son, this time in the courts of New Zealand; and again the Crown has been vanquished, in circumstances which deserve the widest notice.

The facts in *Reade v. Smith*¹ were simple. Smith was the father of a schoolboy; the family had been living in Auckland since 1954. The boy was first enrolled at the Point England Public School; in February 1955 he was transferred to the Glen Innes School under a zoning scheme of the Auckland Education Board. A year later there was a further re-zoning, and the boy was transferred to the Glen Brae School. By August 1958 this school had become overcrowded, and the boy was directed to transfer to a new school (Glen Taylor) for the third time. His father, being concerned at the unsettling effect of these continual changes on his son's education, refused to comply with the transfer notice and continued to send the boy to the Glen Brae School (where he was refused tuition). In due course he was charged under the truancy sections of the Education Act, but the magistrate dismissed the information, holding that the regulations authorising the compulsory transfer of a pupil were invalid. The attendance officer appealed by way of case stated to the Supreme Court of New Zealand, where the matter came before Turner J.

The only point in dispute was the validity of the regulations. These had been made by the Governor-General in pursuance of powers conferred on him by the Education Act, 1914, and by section 6 of the Education Amendment Act, 1915. The Crown pointed to several provisions of the 1914 Act which conferred power to make regulations for specific purposes, but the attempt was faint-hearted; the powers were plainly too narrow to justify a general compulsory transfer scheme designed to overcome overcrowding in schools. And so the Crown fell back on section 161 (1) (k) of the 1914 Act, which empowered the Governor-General to make regulations

¹ [1959] N.Z.L.R. 996.

"generally for all purposes which he thinks necessary in order to secure the due administration of this Act."

The contention of the Crown was both simple and familiar. The words of the power are plain; if the Governor-General thinks that a particular regulation is necessary to secure the due administration of the Act, he may make it. The foundation of the power is the Governor-General's opinion, and the court cannot inquire whether that opinion is well founded. Needless to stress, heavy reliance was placed on *Liversidge v. Anderson*² in this argument. The respondent countered by reference to passages in *Robinson v. Minister of Town and Country Planning*,³ *Point of Ayr Collieries, Ltd. v. Lloyd George*,⁴ *Carltona, Ltd. v. Commissioner of Works*,⁵ *Nakkuda Ali v. Jayaratne*⁶ and *Attorney-General for Canada v. Hallet and Carey, Ltd.*⁷ Two New Zealand cases were also cited. In the earlier of these, *Hackett v. Lander*,⁸ Hosking J. held that the court could not test the opinion of the Governor in Council or what he thinks advisable. But in *Herbert v. Allson*,⁹ Smith J. held that he could inquire whether a regulation was reasonably capable of being a regulation for any of the general purposes specified in the Act in question, despite the fact that the empowering section began with the words, "if the Attorney-General is satisfied." He relied on *Lipton, Ltd. v. Ford*,¹⁰ where Atkin J. (as he then was) proposed the same test; but in that case the regulation-making power did not contain any reference to any official's reasons, opinions, or beliefs.

It might have been possible for the court to undertake a minute and searching analysis of these conflicting decisions, with a view to finding some formula which might render them all compatible with each other, at least on the surface. It would, however, have been difficult, on such an approach, to find a principle which would allow the Governor-General's opinion to be impeached in court, for among the official hierarchy a Governor-General, as the Queen's direct representative, stands very high. But a route of this kind exalts form above substance, and Turner J. preferred to deal with the case on the basis of principle.

He first pointed out that the cases which most strongly favoured the Crown's argument had usually arisen under wartime emergency statutes obviously designed to confer the widest powers on the executive. And secondly, he noted that the courts, in deciding cases arising under such powers, had understandably been influenced by the atmosphere of national emergency in which they were heard, and by the possibility of public danger in the disclosure of official information on which the executive opinion had been formed. "No

² [1942] A.C. 206.

⁴ [1943] 2 All E.R. 546.

⁶ [1951] A.C. 66.

⁸ [1917] N.Z.L.R. 947.

¹⁰ [1917] 2 K.B. 647.

³ [1947] K.B. 702.

⁵ [1943] 2 All E.R. 560.

⁷ [1952] A.C. 427.

⁹ [1941] N.Z.L.R. 370.

such feature, of course, is present in the case before me, which I can consider calmly in the more tranquil atmosphere in which litigation is conducted in times of peace."

The learned judge then adverted to the nature of the question on which the executive might have to form an opinion. This could be a question either of fact or of law. The question in the instant case—whether the administration of the Education Act could necessitate the making of the compulsory transfer regulations—was, said the judge, purely or mainly a question of law. There was thus no room for any argument based on the danger of disclosing official information.

But Turner J. did not base his final reasoning on any such distinction as this. He observed that if the Crown's contentions were correct, regulations made under the section would be unchallengeable, no matter how extreme they might be nor how far they might be unconnected with the scope of the Act. (It is, of course, customary for courts, in granting unlimited discretion to the executive, to make a reservation for cases of "bad faith"; but this is of little value, for the courts—in other cases—assure us that the good faith of a Minister, and *a fortiori* of the Queen's representative, cannot be challenged.) He then said:

"I emphatically reject the contention that the question whether the condition has been satisfied can be 'conclusively decided by the man who wields the power.' In a time in which the individual citizen is every day confronted with some new legislation by regulation, it is imperatively necessary for the courts to retain and to exercise the salutary jurisdiction which enables them to protect the liberty of the subject by insisting upon the test proposed by Atkin J. [in *Lipton, Ltd. v. Ford, supra*] and adopted by Smith J. [in *Herbert v. Allson, supra*]. I apply it and hold that the words 'for any purpose which [the Governor-General] thinks necessary to secure the due administration of [the] Act' lay upon me the duty of inquiring whether the purposes of the regulation could reasonably as a matter of law have been considered by the Governor-General to be necessary in order to secure the due administration of the Act; and if the regulation cannot pass this test, it will become my duty to declare that it is *ultra vires* and void."

These were brave words; but they were far more than that. For the judge looked at the Act and pointed out that its basic scheme was one of compulsory attendance at a school coupled with freedom to choose *which* school. That was the scheme whose due administration the Governor-General could, by regulation, implement; and regulations purporting to compel attendance at a particular school despite the parent's desire to choose a different school could not possibly be necessary to implement it.

The Crown, however, had one more argument. This was that the regulations could be sustained by the power conferred by

section 6 of the Education Amendment Act, 1915. The terms of this were:

“The Governor-General in Council may make such regulations as he thinks necessary or expedient for avoiding any doubt or difficulty which may appear to him to arise in the administration of the principal Act by reason of any omission or inconsistency therein, and all such regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding.”

Of this provision, Turner J. remarked that, not content with delegating its principal (law-giving) function to the Governor-General, the legislature had purported to sign a blank cheque and to ratify in advance whatever might be done by regulation, even if that were in conflict with the express provisions of the Education Act itself. He thought that this would surprise anyone accustomed to the notion that the law-giving powers of the people were reposed by them in Parliament. Accordingly, “in construing a section which at first sight may appear to carry self-abnegation so far, the court will strive to give it a restricted interpretation, preferring to regard Parliament as not having made any more complete surrender of its powers than must necessarily follow from the plain words used.” Adopting this approach, the judge endorsed the magistrates’ view that the phrase “doubt or difficulty” in the section must be understood in the light of the maxim *noscitur a sociis*. The difficulty which inspired the regulations was a practical administrative difficulty involved in trying to house too many children in too little accommodation. But this was not a “difficulty in the nature of a doubt” and thus not a difficulty which entitled the Governor-General to make regulations under the section.

Thus, the regulations were invalid, and the appeal was dismissed. It must be admitted that the practical outcome is far from ideal. The shortage of educational accommodation in Auckland renders complete freedom of choice of a school unattainable in practice. So long as this shortage endures, wisdom would suggest that a parent should be free to choose among those schools where places are available, with some form of restriction to cover cases where the demand for places exceeds the supply; and that when a pupil has obtained a place in a school, he should normally be able to retain it so long as his parent wishes him to stay there. But a solution of this kind was not open to Turner J., for it would have necessitated a complete rewriting of the regulations, which is not a task which a court can perform. He had to choose between endorsing the Act, which gave complete freedom of choice, and upholding the regulations, which wiped out any choice. It is submitted that he rightly preferred the work of Parliament to that of the executive; under our notions of government Parliament, not the executive, is the lawmaker.

It may be doubted whether an English court would have reached

a similar decision, had it been faced with an order made by the Queen in Council pursuant to powers of similar breadth. English courts have gone very far in conceding immunity from judicial scrutiny to executive discretion, at least where the executive official is at or near the top of the administrative hierarchy.¹¹ And occasionally they have swung too far in the opposite direction. The remarks of the Court of Appeal in *London County Council v. Central Land Board*,¹² reproving Danckwerts J. for considering departmental views as to the proper interpretation of a statute, exemplify such a swing; they seem to be based on the notion that to consider an opinion is to be bound by it—which surely goes too far. Yet, officials who are charged with the day-to-day administration of a statute are likely to have a deeper understanding of its problems than is a court which encounters the statute only at rare intervals. It is therefore wise for the court to ponder deeply the administrative viewpoint, and even to accept it if it is an interpretation which is reasonably open, while retaining power to overrule the interpretation if it seems plainly wrong, or inconsistent with the broader provisions of the Statute Book. This is the attitude which the United States Supreme Court adopts.¹³

It may be regretted that an approach of this kind was not adopted by Turner J. in the instant case. For while one may agree with his interpretation of the 1914 Act, it is difficult to accept wholeheartedly his views on the 1915 Act. The phrase "doubt or difficulty" which was there used is scarcely a typical phrase to which the maxim *noscitur a sociis* would apply, and his interpretation of it virtually robs the word "difficulty" of any useful meaning. Unfortunately, however, the case was put to him on an "all-or-nothing" basis.

Cases such as this strongly suggest that our whole attitude to problems of administrative law needs careful rethinking. Such problems are often approached as if they involve no more than a determination whether court or executive is to be "top dog." But since it is accepted without apparent qualification that Parliament (which is dominated by Cabinet) may decide this question either way, as it pleases, this route can easily lead to law-making by the executive. A better approach would be for courts to recognise frankly, and accept, the fact that on many matters (including even some "questions of law" such as the interpretation of a specific provision of a particular statute) the executive, by reason of its daily familiarity with the problems, may have a more intimate and expert understanding than themselves. They can respect this

¹¹ Consider, for example, the remarks of Scott L.J. in *Sparks v. Edward Ash, Ltd.* [1943] K.B. 223, 229-230, and the decision of the Court of Appeal in *R. v. Comptroller-General of Patents, ex p. Bayer Products, Ltd.* [1941] 2 K.B. 306.

¹² [1958] 1 W.L.R. 1296.

¹³ See, for example, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and compare with it *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

understanding and at the same time insist that the executive is, in the last resort, "under the law." This, it is submitted, is the best way to preserve the rule of law.

PETER BRETT.

OMNIA PRAESUMUNTUR . . .

"At the foot or end thereof," which is where, according to the Wills Act, 1837,¹ a testator should sign his will, does not rival certain other simple phrases² as a cause of litigation. But it caused sufficient difficulty to require statutory amplification fifteen years after enactment³ and still gives rise to litigation from time to time. The reason is that this is one of the points at which formal requirements impinge upon complete informality. On the one hand, any testator in England, however ignorant or dim-witted (short of actual insanity), may write or have others write for him—without advice if he chooses—what he wishes to happen to his property at his death. On the other hand, before these wishes attain legal effect he must, amongst other things, conform to certain rules about where and in whose presence he signs what he has written or had written. Conflict at such a point is inevitable, and in the last analysis it is probably the presumption in favour of validity that resolves most doubts and saves most dispositions, provided there is evidence that the testator attempted to comply with the required forms.⁴

The possibility of differing views on where is "the foot or end" of a will may arise where the whole will is written on one side of a single sheet of paper. Thus, it has been held that a signature in the left-hand margin opposite the beginning of the will was at the foot or end of the will,⁵ where the paper had been turned sideways after the writing reached the bottom of it in its original position. So also—perhaps the extreme of liberality—when the signature was in a box which had been drawn two-thirds of the way down the page before the words of the will had been written round it.⁶ But not where, there being no more room at the bottom, the signature was written at the top of the page in the position in which it had been written on.⁷

That many further complications are possible where the will consists of more than one sheet of paper, even where no fraud is

¹ s. 9: "... it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction. . . ."

² Such as "in the course of and arising out of the employment."

³ By the Wills Amendment Act, 1852, s. 1, which amended the simple words with impressive verbosity, and less impressive effect.

⁴ As Lord Esher said in *Re Harrison* (1885) 30 Ch.D. at p. 393 in another connection: "There is one rule . . . which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will."

⁵ *Re Roberts* [1934] P. 102

⁶ *Re Hornby* [1946] P. 171.

⁷ *Re Stalman* (1931) 145 L.T. 339; [1931] W.N. 143.

suspected, is amply illustrated by the reports,⁸ and not least by the recent case of *Re Little (deceased)*.⁹

Here the will, as prepared by solicitors, consisted of five foolscap sheets of paper which they sent to the deceased fastened together by a two-pronged brass paper-fastener. The dispositive provisions and the attestation clause were typed on the first four pages; the fifth and back page was blank on the side adjoining the fourth sheet but on the outside was marked "Draft Will." It was from this back sheet that the difficulties arose. When found deposited with his Bank, after the deceased's death, the five sheets were fastened together by a paper fastener in essentially the same position as when sent out by the solicitors, and a fold mark on each sheet close to the hole made by the fastener presumably indicated that the pages, while so fastened, had been folded to lie in a different order. The deceased's signature and those of the attesting witnesses appeared on the inside of the fifth sheet below some holograph dispositions. On the outside of that sheet the word "Draft" of "Draft Will" had been struck out.

On such facts alone no problem would have arisen, but for the evidence of one of the attesting witnesses that when the deceased asked the witness and his wife to attest his signature, he pulled from his pocket about six sheets of foolscap paper, and after making a trimming motion similar to that used after shuffling a pack of cards, placed the sheets on the table with a blank sheet uppermost. The witness saw nothing of the other sheets, but testified that the top blank sheet appeared separate and not fastened to the others. The deceased then put his left hand on the top of the sheets of paper, wrote his own name some eight or more inches from the top of the blank sheet, indicated where the witnesses were to subscribe their names and particulars, and continued to hold the sheets with his left hand while they did so.

The first question raised by this evidence was whether the deceased wrote his signature at the foot or end of the will when he wrote it some two-thirds of the way down a blank sheet of paper that might or might not be fastened to other sheets that might or might not have contained the typewritten dispositive clauses of the will. Here Sachs J. found in favour of the will on the four grounds that: (a) It was to be inferred that the other four sheets of the will were underneath the sheet on which the signatures of the deceased and the attesting witnesses were written. (b) Contrary

⁸ As where a will form is used with an attestation clause printed on the first page and the testator and witnesses sign where indicated, but the dispositive words of the will appear on other pages. Such wills were admitted to probate in *Re Wotton* (1874) L.R. 3 P. & D. 159; *Re Smith* [1931] P. 225; *Re Long* [1936] P. 166, but largely failed in *Royle v. Harris* [1895] P. 163; *Re Gee* (1898) 78 L.T. 843. See also [1953] 1 W.L.R. 689, *Practice Direction*. For cases where the intended will was enclosed in an envelope, on which was the testator's signature and those of the attesting witnesses, see *Re Mann* [1942] P. 146 and *Re Bean* [1944] P. 83.

⁹ [1960] 1 W.L.R. 495; [1960] 1 All E.R. 387.

to the evidence of the attesting witness, the presumption applied that sheets bound together and constituting the will as found were so bound together at the time of execution and attestation.¹⁰ Here the fact that the will was found fastened together in proper order at the deceased's death distinguished the case from those like *Re Amos*,¹¹ in which the deceased's signature and those of the attesting witnesses were found in the midst of a disordered bundle of papers. (c) If, on the other hand, the sheets were not fastened at the time of execution, the fact that the deceased held them together with his left hand throughout the relevant time constituted a sufficient nexus to constitute them one testamentary document.¹² (d) It was irrelevant that the last sheet was on top of the others at the time of execution since "whatever place a sheet of paper may have in a given bundle at a given time, if it is intended to be in effect the last sheet, then the law so regards it."¹³

The second question which arose was as to the inference to be drawn from the evidence that the signatures of the deceased and the attesting witnesses were written following two-thirds of a blank sheet of paper. This evidence was accepted, with the result that the holograph dispositions which appeared on the fifth sheet of the will as found were held invalid as having been inserted after execution. The court was then invited to draw the inference that since the testator deliberately left space for further dispositions he intended to make after the document had been executed, he did not intend the document to have any effect until after he had made the intended additions. Fortified by the provision in the Wills Act Amendment Act, 1852, s. 1,¹⁴ which makes it clear that a will is not invalidated by the existence of a blank space between the dispositive provisions and the signature, and by previous authority,¹⁵ Sachs J. refused to draw any such inference, but pronounced in favour of the will without the holograph dispositions on the fifth page, or a small holograph amendment on the second page.

O. M. STONE.

DAMAGES AND NERVOUS SHOCK

IN *Schneider v. Eisovitch*,¹ the plaintiff and her husband and the defendant and his wife were all travelling together, on holiday in

¹⁰ As in *Rees v. Rees* (1873) L.R. 3 P. & D. 86.

¹¹ [1954] 2 D.L.R. 574, a case from Ontario, in which there were other complicating factors.

¹² As in *Lewis v. Lewis* [1908] P. 1, where the two pages of the will were held between the testator's finger and thumb when he acknowledged his signature to the witnesses.

¹³ [1960] 1 All E.R. at p. 391.

¹⁴ "... no such will shall be affected . . . by the circumstance that a blank space shall intervene between the concluding words of the will and the signature. . . ."

¹⁵ *Gregory v. Queen's Proctor* (1846) 4 *Notes of Cases*, 620; *Re Arthur* (1871) L.R. 2 P. & D. 273.

¹ [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169.

France, in a car driven by the defendant. Owing to the defendant's negligent driving the car crashed into a tree. The plaintiff suffered physical injuries rendering her unconscious and her husband was killed. When the plaintiff recovered consciousness in a French hospital she was told of her husband's death and suffered shock. On hearing of the accident, the plaintiff's brother-in-law and sister-in-law at once flew from England to France, without any request from her, to bring her and her husband's body home.

Two interesting problems on damages arose in the plaintiff's personal action for damages:

(1) Could the plaintiff recover the expenses which her relatives had incurred in going to France, and which she had undertaken to pay them out of any damages which she recovered?

The defendant argued that he could not be liable for this: there had been no request for assistance, and therefore there could be no implied contract to repay. Thus, there was merely a moral obligation, but no legal liability, on the part of the plaintiff to her relatives. Paull J., assisted by sparse authority,² held that "strict legal liability is not the be-all and end-all of a tortfeasor's liability." However, a mere moral obligation was not enough. Before such a sum can be recovered it must be shown that (a) such person's services were reasonably necessary as a consequence of a tortious act, (b) the expenses were reasonable in amount and would have been incurred in any event, and (c) the plaintiff undertakes to pay the expenses. In this case these conditions were satisfied and so the plaintiff recovered the claimed sum. Hemmed in by these three conditions, the tortfeasor's liability for a moral obligation on the part of the plaintiff is reasonable and just and cannot be said to offend any rules of remoteness of damage.

(2) Could the plaintiff recover damages for shock?

The shock of the whole episode resulted in the plaintiff developing recurrent attacks of neuro-dermatitis, and Paull J. found that this was caused by three factors: first, the shock of the accident itself which resulted in the physical injuries to the plaintiff; secondly, the shock of discovering in hospital that her husband who had been with her had been killed in the same accident; and thirdly, the continuing mental strain of having to adjust her life after her husband's death. The learned judge had no doubt that damages for the first factor were allowable, and that damages for the third factor were not. The difficulty was whether the plaintiff could recover damages for shock as a result of learning of her husband's death from a third party. Paull J. held that the plaintiff could recover damages under this head and he awarded £400 for all the consequences of the shock. The defendant was admittedly in breach of his duty to take care and, therefore, applying *Re*

² *Allen v. Waters* [1935] 1 K.B. 200, 215, *per* Goddard J.; *Dennis v. London Passenger Transport Board* [1948] 1 All E.R. 779, Denning J.

Polemis,³ he must be liable for all the direct consequences of his act; *Hambrook v. Stokes*⁴ and *Bourhill v. Young*⁵ were not relevant, since they were concerned with whether or not a duty of care exists, not with remoteness of damage. The learned judge reasoned that it was common ground that if the plaintiff had not herself been injured but had *seen* her husband killed the resultant shock would have been actionable. "... It seems to me to follow that once a breach of duty is established the difference between seeing and hearing is immaterial. Hearing can be just as direct a consequence as seeing. The fact that owing to unconsciousness in this case a period of time elapsed before the news was heard makes no difference provided the news was a consequence which flowed directly from the breach of duty towards the plaintiff, any more than it makes any difference that an operation takes place after an interval of time. The fact that the defendant by his negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her, but the plaintiff having a cause of action for the negligence of the defendant may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action."

It is respectfully submitted that this aspect of the decision has wide implications and that it is not supported by present authority. The well-known nervous shock cases were not considered in detail because the learned judge accepted that they all dealt with the nervous shock problem at duty of care level, and here, since it was admitted that there was a breach of duty to take care, the problem should be discussed purely on the remoteness of damage level. It is true that in *Bourhill v. Young* the House of Lords found that there was no duty of care, and so if one adopts a strictly mechanical approach it is not necessary to consider it here. But even on this basis one cannot dismiss *Hambrook v. Stokes* so lightly. There, as here, negligence was admitted by the defendants and, although the question of whether or not a duty of care existed was discussed, it was also decided that since negligence was admitted in the pleadings the matter must also be decided on the remoteness of damage level. Whether or not *Hambrook v. Stokes* is a sound decision has been exhaustively discussed academically, but the House of Lords in *Bourhill v. Young*, while expressly reserving their right to consider its validity, emphasised that negligence was admitted in the pleadings. The Court of Appeal in *King v. Phillips*⁶ also stressed this point. It cannot be accepted, therefore, that *Hambrook v. Stokes* has no application to this case. There, the plaintiff's wife saw an unoccupied lorry descending a

³ [1921] 3 K.B. 560.

⁴ [1925] 1 K.B. 141.

⁵ [1943] A.C. 92.

⁶ [1953] 1 Q.B. 429.

hill in the direction of her children, who were out of her sight round a bend in the road down the hill. Nervous shock caused by fear for their safety resulted in her death. It was held that an action for negligence lay against the owners of the lorry. There was some doubt in the case whether the mother had sustained nervous shock as a result of what she saw or as a result of what somebody subsequently told her. The Court of Appeal firmly stated that if the latter had been the case, then the defendants would not be liable. This brings us sharply back to the decision in *Schneider v. Eisovitch*.

One important factual distinction between the two cases is that whereas in *Schneider v. Eisovitch* the plaintiff suffered physical injury in the accident as well as subsequently sustaining nervous shock, in *Hambrook v. Stokes* the mother suffered no direct physical injury. Can it be said, therefore, that if a person does suffer physical injury and then sustains nervous shock because she is told further bad news about the accident, damages for the shock can be recovered, whereas no damages can be recovered if nervous shock arises in this way without physical injury? Paull J. rightly did not favour this distinction. However, his decision seems to have been influenced by this factor.

There is a widely held view that there is little legal logic in nervous shock cases, as indeed in many negligence cases, and few results are predictable. The courts know that, notwithstanding the negligence of a defendant in a case, a remedy for nervous shock cannot always be given. It is easier to sense where the limit should be than to express it. Therefore often the court may make a concealed value judgment on the facts of a case and will then justify it by applying mechanical tests, *i.e.*, duty of care, breach of duty and damage. It is easier to justify a value judgment by asserting that no duty of care exists than to accept the existence of a duty of care but then say that the damage is too remote. Hence most cases on nervous shock stand or fall on the duty level—*Hambrook v. Stokes* is unusual because negligence was admitted in the pleadings and for this reason it was assumed that there was a duty of care to the mother. This creative policy decision is implicit in the statement by Lord Wright in *Bourhill v. Young*: "The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the judge or jury decides." A more practical method of approach is that of Denning L.J. (as he then was) in *Roe v. Minister of Health*.⁷ He would look broadly at the situation and decide on a remedy after answering one question: "Is the consequence fairly to be regarded as within the risk created by the negligence?" It is this attitude which one feels the Court of Appeal in *Hambrook v. Stokes* adopted when they indicated that they would stop short of giving a remedy for

⁷ [1954] 2 Q.B. 66, 85.

nervous shock which occurs when the plaintiff is informed of tragedy. If this were not so the courts would have to admit that it can reasonably be foreseen that nervous shock can be sustained not only by a victim of the accident who hears of her husband's death in hospital, but also by any close relative who is informed of the injury to the victims of the defendant's careless driving no matter where in the world he may be. A duty of care will be owed to every person who might reasonably be emotionally upset by news of an accident to another. It is for this reason that the consequence here cannot fairly be regarded as being within the risk created by the negligence. Paull J., however, appears to have lost sight of this attitude because the defendants admittedly were negligent and the plaintiff could recover damages for her physical injuries. This is an unjustifiable extension of "parasitic" or consequential damages. If the plaintiff had not been involved in the accident and had been informed at home of her husband's death, the defendant would have owed her no duty of care. Because she could ground an action in negligence in respect of her physical injuries she could also recover damages for the nervous shock arising from what she was told later. The *Re Polemis* principle is being extended to include damages for unforeseeable consequences which are not "immediate physical consequences" of the breach of duty. At a time when the wideness of *Re Polemis* is severely criticised it is unfortunate to extend the principle even further.

How then could the learned judge have distinguished between the two types of damage once a breach of duty to take care was admitted? If there had been no physical injury and the defendant had denied that he owed a duty of care to the plaintiff, it is felt that the nervous shock cases would have provided ample authority for a court to say that no duty of care was owed to the plaintiff because the damage to her was not "legally" reasonably foreseeable. Now that a duty of care to the plaintiff is admitted the application of a mechanical approach makes it necessary to discuss the remedy in terms of remoteness of damage and *Re Polemis*. Is this a direct result of the breach of duty to the plaintiff? It is logically consistent with the above argument to say that the nervous shock sustained as a result of discovering that her husband was dead was not a direct result of the breach of duty to the plaintiff. There was, it could be argued, a *novus actus interveniens*, since the defendant could not "legally" reasonably foresee that the subsequent discovery would produce this result and unforeseeable damage is only a direct result of the negligent act when it is an "immediate physical consequence": news of death cannot be that. This is probably placing the hypothetical reasonable man in a sheltered position, but it is no more unrealistic than to refuse to give the plaintiff compensation for the continuing mental strain of having to adjust her life after her husband's death,

and Paull J. came to this conclusion without any hesitation. This rationalisation, though, is unsatisfactory. It would be more sensible to apply the comparatively unknown and unused "interest theory"⁸ of negligence, and say that although the defendant owed the plaintiff a duty of care in respect of her physical security, no duty of care was owed to her in respect of nervous shock sustained as a result of hearing bad news. A great deal of sympathy must be felt for the plaintiff, but this should not be allowed to add further illogicality and confusion to the nervous shock cases.

G. DWORKIN.

RESTITUTION OF ILLEGAL PAYMENT

LORD DENNING's judgment, delivered on behalf of the Judicial Committee of the Privy Council, in *Kiriri Cotton Co. Ltd. v. Ranchhoddas Keshavji Dewani*¹ deserves careful study and illuminates several difficult points in a branch of the law where, although the principles have been frequently stated, the decisions are conflicting and there is often a doubt which principle properly applies.²

When are parties *in pari delicto*? What if the money sought to be recovered had been paid under a mistake of law common to them both? If the payment of a premium for a lease be prohibited by a Rent Restriction Ordinance which, enacting that its receipt is a criminal offence punishable by a substantial fine or imprisonment or both, yet, contrary to the English Acts, does not specifically enable the tenant to recover it back, is the absence of such a provision conclusive? Does the omission of a statutory remedy exclude the remedy of money had and received?

The case came on appeal from the Court of Appeal for Eastern Africa and arose under the Uganda Rent Restriction Ordinance, 1949, s. 3 (2).

An Indian merchant, coming to Kampala in Uganda in 1953, looked for somewhere to live. With difficulty he found a flat, but had to pay a premium of 10,000 shillings, which he borrowed. This money he now reclaimed from the landlords, saying that the payment, being in contravention of the Ordinance, was illegal. The High Court of Uganda gave him judgment and the Court of Appeal for Eastern Africa affirmed the decision. The landlords appealed.

He had taken the flat "for residence only" on a sub-lease prepared by lawyers for seven years and one day, at a rent of 300 shillings a month. Neither party thought that, on a lease

⁸ See Street, *Law of Torts* (2nd ed.), 113; Payne, *Current Legal Problems* (1952); (1955) 18 M.L.R. 43; Machin (1954) 17 M.L.R. 405; Lord Wright, "*Re Polemis*," 14 M.L.R. 393, 398. Cf. Denning L.J. in *King v. Phillips*.

¹ [1960] 2 W.L.R. 127 (Lord Denning, Lord Jenkins, the Rt. Hon. L. M. D. de Silva); [1960] 1 All E.R. 177.

² See, generally, the penetrating analysis by J. K. Grodecki, "*In pari delicto, potior est conditio defendentis*" (1955) 71 L.Q.R. 254-274.

for such a period, a premium was wrong. The Ordinance provided that a premium on a lease of "premises" for seven years or more was not unlawful. But the word "premises" in the definition section (s. 2) referred to business premises only, and not to residential flats, and the lawyers, apparently, had not appreciated this. "An easy mistake," Lord Denning said; hardly venial, nevertheless, one would have thought. Nor was it material whether the premium was extortionate. It was a new flat; no standard rent had been fixed. Upon a standard rent of 450 shillings a month for seven years, there would be nothing extortionate in a premium of 10,000 shillings and a rent of 300 shillings a month.

In 1950 the Court of Appeal for Eastern Africa (differently constituted) had held that without a statutory right of recovery of an illegal premium (analogous to Rent Restriction Act, 1920, s. 8 (2)), a person giving the premium, having aided and abetted the commission of an offence by the landlord, could not go to a civil court with clean hands.³

That there is a distinction between positively enforcing an illegal contract and seeking to recover money paid under it, is clear. Where the illegal purpose has been wholly performed, the plaintiff cannot recover.⁴ But "in cases of oppression" it may be recovered, for the parties are not *in pari delicto*.⁵ Since, in the present case, the money was paid and the lease was granted, the illegal transaction was fully performed and the premium could only be recovered if the parties were not *in pari delicto*.

Now, on the face of it, both parties appeared to be *in pari delicto*. The money was paid under a common mistake of law, each party being equally mistaken that the premium was lawful. Money thus paid under a mistake of law, it was argued, could not be recovered.⁶ The Judicial Committee rejected the argument.

Lord Denning said:

"It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*."⁷

The next proposition is the one crucial to the case:

"Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without

³ *R. v. Godinho* (1950) 17 E.A.C.A. 132.

⁴ *Herman v. Jeuchner* (1885) 15 Q.B.D. 561, 564, *per* Brett M.R.

⁵ *Per* Lord Mansfield in *Loury v. Bourdieu* (1780) 2 Doug. 468, 472.

⁶ In *Harse v. Pearl Life Assurance Co.* [1904] 1 K.B. 552, 563, *per* Collins M.R., an insurance agent innocently misrepresented to the plaintiff that an insurance on his mother's life would be valid. *Held*, the statement not being one of fact and there being no oppression or fiduciary relationship, the premium was irrecoverable.

⁷ [1960] 2 W.L.R. 132, 133.

more ado, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham* (1876) 3 Ch.D. 351, 355.”⁸

What, then, is the extra quality which, despite a mistake of law, can enable the recovery of money paid?

“If there is something more in addition to a mistake of law—if there is something in the defendant’s conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, *if as between the two of them the duty of observing the law is placed on the shoulders of one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto* and the money can be recovered back; see *Browning v. Morris* (1778) 2 Cowp. 790, 792.”⁹

In this proposition, although, it may be thought, the Privy Council has carried the law further than has hitherto been understood by Lord Mansfield’s principle, Lord Mansfield’s words are capable of the widest meaning. He declared:

“But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.” Here, said Lord Denning, “The duty of observing the law is firmly placed on the shoulders of the landlord for the protection of the tenant; and if the law is broken, the landlord must take the primary responsibility.”¹⁰

The final point made in the judgment is upon the absence of a statutory remedy of recovery.

The omission of such a remedy, says Lord Denning, does not exclude the remedy by money had and received which exists at common law, independently of statute. In support of this he cites the considered judgment of Parker J. (as he then was) in *Green v. Portsmouth Stadium, Ltd.*¹¹ A bookmaker paid entrance fees to a racetrack in excess of the charge authorised by statute. The defendants claimed that the excess payments, being illegal, or, alternatively, made under a mistake of law, were irrecoverable. Parker J. held that the relevant section was penal, and that the

⁸ [1960] 2 W.L.R. 133. See also *per* Mellish L.J., who, citing the general rule that “money paid with a full knowledge of the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered,” said that this did not affect the power of the courts of equity to relieve against mistakes in law as well as against mistakes in fact, “that is to say if there is any equitable ground which makes it, under the particular facts of that case, inequitable that the party who received the money should retain it.”

⁹ [1960] 2 W.L.R. at 133 (*italics added*).

¹⁰ [1960] 2 W.L.R. at 134.

¹¹ [1953] 1 W.L.R. 487.

contracts on each admission to the stadium were illegal; nevertheless, on Lord Mansfield's principle in *Browning v. Morris* the parties were not *in pari delicto* and the plaintiff was not debarred from his claim, even though the statute provided no civil action to recover and he was seeking indirectly to enforce a statutory obligation.

The decision, as Lord Denning himself points out, was reversed by the Court of Appeal (of which he was a member), who held that no civil action lay for the recovery of those charges illegal under section 13 (1) of the Betting and Lotteries Act, 1934, since the statutory obligation was enforceable by criminal proceedings only.¹² Denning L.J. (as he then was) said:

"It is most significant that the Act does not say that the overcharge shall be recoverable. In modern statutes, such as the Rent Restriction Acts dealing with such matters as premiums, one finds that if it is intended that an overcharge shall be recoverable the Act says so. This Act does not. It says only that the person responsible shall be guilty of an offence. . . . The presumption is that where the statute provides those consequences for a breach, no other remedy is available."

Nor would an action lie by implication: that proposition, after *Cutler v. Wandsworth Stadium, Ltd.*,¹³ was "almost unarguable," where the House of Lords held that the Act was "not a book-maker's charter. It is for the regulation of racecourses, and the mode of regulation is by means of the criminal courts and not by way of civil action."

Lord Denning proceeded to deal with the action for money had and received and the judgment of Lord Mansfield in *Browning v. Morris*, upon which Parker J. had decided the case. These observations, he declared,

"only apply to cases where the statute, on its true construction, contemplates the possibility of a civil action. He said that it was 'in furtherance of these statutes' that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received. It is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge. I see nothing in this statute to authorise such an action."¹⁴

These earlier observations would appear, on the face of them, to be in conflict with the reasoning of Lord Denning in *Kiriri Cotton Co. Ltd. v. Dewani*.¹⁵ Normally, it is true, a modern statute does provide recovery if that is intended. If Lord Mansfield's principle of recovery applies only "where the statute, on its true construction, contemplates the possibility of a civil action," does the Rent

¹² [1953] 2 Q.B. 190, 195, 196.

¹³ [1949] A.C. 398, at 407, 408, *per* Lord Simonds; at 417, *per* Lord Reid.

¹⁴ [1953] 2 Q.B. at 196.

¹⁵ Contrast [1953] 2 Q.B. 190, 195-196 with [1960] 2 W.L.R. 127, at 134.

Restriction Ordinance, 1949, of Uganda, "on its true construction" contemplate the possibility of a civil action? There is, of course, a clear distinction between the intention of this Ordinance and the intention of the Betting and Lotteries Act, 1934. The purpose of that statute was to regulate racecourses; the mode was by criminal prosecution not by civil action. The purpose of the Ordinance was to protect tenants from exploitation. Even so, can it be said that the Ordinance "contemplates the possibility of a civil action"?

Lord Denning's judgment in the *Kiriri* case, after referring to *Browning v. Morris*, appears to rely more particularly upon Lord Mansfield's judgment in *Smith v. Bromley*¹⁶ and the "celebrated judgment" in *Moses v. Macferlan*.¹⁷ In the examples there given, the principle of recovery in an action for money had and received is stated quite generally—imposition, extortion, oppression, undue advantage contrary to laws made for the plaintiff's protection. In *Browning v. Morris*, on the other hand, Lord Mansfield is more precise. He refers to contracts prohibited by statute to protect one set of men, liable to be oppressed or imposed upon, from another, where the parties are not *in pari delicto*. But why was it necessary to give a restrictive meaning to the words "in furtherance of these statutes" and to hold that you can recover in an action for money had and received only if the statute, properly interpreted, so enables you?

It does seem that there is a conflict between Denning L.J. in *Green v. Portsmouth Stadium, Ltd.*, and Lord Denning in *Kiriri Cotton Co., Ltd. v. Dewani*. If the decision in *Green* is right, is the reasoning in *Kiriri*—which makes recovery independent of remedy in the Ordinance—consistent with it?

Kiriri is a decision of the Privy Council and the law still awaits re-examination and restatement by the House of Lords. Decisions are conflicting and unnecessary refinements have found their way in. "Lord Mansfield was conscious that if the brocard *in pari delicto* was to be a beneficial rule of jurisprudence it should not be allowed to become rigid and inflexible."¹⁸ If Lord Mansfield's words are interpreted—not as if they were the words of a statute—but in their intended significance, *viz.*, that the basis of the action for money had and received is that "upon the circumstances of the case," the law imposes an obligation on the defendant to return the money to the plaintiff, that remedy should remain flexible. The justice of the case, it may well be thought, requires recovery

¹⁶ (1781) 2 Doug. 695, 696, 697: "If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive. . . ." And also, at 697a: "But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover. . . ." And see note 2 of the reporter, under (F.7.) at the foot of that page.

¹⁷ (1760) 2 Burr. 1005, 1012.

¹⁸ J. K. Grodecki in (1955) 71 L.Q.R. 254, at 258.

even when, as in *Kiriri*, the statute, on its true construction, does not appear to contemplate the possibility of a civil action.

GEORGE J. WEBBER.

*OHOCHUKU v. OHOCHUKU*¹—A VARIATION OF *THYNNE v. THYNNE*²

THE decision of Wrangham J. in the *Ohochuku* case cannot fail to interest conflict lawyers and family lawyers alike. The facts present a polygamy problem *prima impressionis* with a rather nice twist. The situation was as follows: the petitioning wife and her husband were Nigerian Christians whom the learned judge found to be domiciled in Nigeria at all material times. They had married in Nigeria according to local custom in 1949. According to expert evidence given at the trial the effect of this ceremony was to constitute a valid marriage according to Nigerian law. The evidence also showed that the marriage was potentially polyandrous and potentially polygamous, since Nigerian law would permit both the wife and the husband—even though they were Christians—to contract lawful marriages with other spouses during the subsistence of that marriage. In the course of her evidence, the wife stated that she had intended the marriage to be for life and that neither party should take other partners during the subsistence of the marriage. The respondent husband came to England in 1950 and the wife joined him there in 1953. The parties evidently had no doubt about the validity of their marriage in Nigeria, but apparently the wife found that it would be desirable for her to have a marriage certificate to produce in England. Accordingly the parties (neither of whom had taken another spouse since the Nigerian marriage) went through a second ceremony of marriage at the St. Pancras register office. The report does not state how the parties described their status to the registrar. In the events which happened, the wife in 1959 sought a decree of divorce on the ground of her husband's cruelty. The suit was not defended and the Queen's Proctor did not appear. The court assumed jurisdiction under section 18 (1) (b) of the Matrimonial Causes Act, 1950, the conditions thereby laid down being fulfilled. The wife was thrown back on this alternative claim to the court's jurisdiction because of the judge's finding that the husband had never lost his domicile of origin in Nigeria.

Having found in the wife's favour on the issue of cruelty, Wrangham J. rhetorically asked: "The only question is, which marriage is it that has to be dissolved?"³ It is not made absolutely clear in the report what cases counsel for the wife cited to his lordship or what cases his lordship considered in the course of his judgment. It is, however, clear that the learned judge observed that recent cases showed that a court dissolving a marriage must

This is
erroneous
There is no
place in
Nigeria
where
polyandry
is practised
/ monstrous

¹ [1960] 1 W.L.R. 183; [1960] 1 All E.R. 253.

² [1955] P. 272 (C.A.).

³ [1960] 1 All E.R. at p. 255.

make it clear what marriage it is dissolving.⁴ This is amply borne out by *Reder v. Reder*⁵: a divorce commissioner had granted the husband a decree nisi dissolving whichever of two ceremonies of marriage had and solemnised between him and his wife had created the marriage between them. The first (and evidently monogamous) marriage had been celebrated in a Polish synagogue in 1914, the second in 1926 in an English register office. The Registrar refused to make absolute the decree nisi in that form and the matter eventually came before the Court of Appeal. The very short report shows that it was unanimously decided that the decree was a nullity and that Bucknill L.J. and Hodson J. considered that the husband should apply to the Commissioner to decide which of the two ceremonies did create the marriage between the parties and to decree dissolution of that marriage and that if the husband were still dissatisfied with such a decree he could appeal.

Mindful of this point, Wrangham J. went on to decide whether he had jurisdiction to dissolve the Nigerian marriage or only the English one. He decided that the former was polygamous and that, although polygamous marriages were recognised in England for some purposes, it was well settled that no English court would dissolve them.⁶ He considered that the fact that the parties were both Christian and thus would regard their Nigerian marriage as monogamous could not turn their potentially polygamous-polyandrous marriage into a monogamous marriage in the sense of that term as understood in England.⁷ This makes it clear that the parties' mere intentions cannot convert what the *lex loci celebrationis* looks upon as a valid polygamous and/or polyandrous marriage into a voluntary union for life of one man and one woman to the exclusion of all others. His Lordship accordingly dissolved the marriage celebrated in London.

At this stage the complaint might be raised that while the English court had dissolved the parties' English marriage so that, as far as English law is concerned, the parties would be single again when the decree was made absolute, it had nevertheless left them still married according to Nigerian law, the law of the husband's domicile. Such complaint is readily answered, for Wrangham J. stated⁸: "I am told that in fact [the English decree absolute] will be effective by Nigerian law as at present understood to dissolve the Nigerian marriage; but that forms no part of my judgment: that is for someone else to determine and not for me." Hence a limping marriage has evidently been avoided. All the same, even if the English decree had not been thus effective, the learned judge would

⁴ *Ibid.*

⁵ [1948] W.N. 238 (C.A.).

⁶ *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130; nor will such marriages be annulled: *Risk v. Risk* [1951] P. 50, but cf. *Baindail v. Baindail* [1946] P. 122 (C.A.).

⁷ [1960] 1 All E.R. at p. 255.

⁸ *Ibid.*

have been perfectly justified in giving it, since the granting of a divorce decree under section 18 (1) (a) or (b) of the Matrimonial Causes Act, 1950, does not depend upon whether it will be recognised in the courts of the husband's domicile at the date of the commencement of the suit.⁹

The *Ohochuku* case bears comparison with *Thynne v. Thynne* because the Court of Appeal in the latter case decided that a decree of divorce does not dissolve the marriage ceremony but dissolves the parties' status as married persons. In that case the parties, by reason of parental opposition, had married secretly (though validly) in a London church; later, after the opposition was withdrawn, they went through a second (and therefore null) ceremony at another London church. Years later the English court dissolved this second marriage at the wife's suit, her petition not having disclosed (as the rules of the court required)¹⁰ any particulars of the first marriage. The result was that both decree nisi and decree absolute contained only the particulars of the second and null ceremony. Both parties had remarried in reliance on the final decree when it became apparent that the "wrong" marriage had been dissolved. Following, *inter alia*, *Hampson v. Hampson*¹¹ and *Marshall v. Marshall*,¹² a majority of the court¹³ felt able to allow the decrees to be amended¹⁴ by deleting therefrom the references to the date and place of the second ceremony and noting on each decree that the recitals had been struck out by the court, it being satisfied that the earlier marriage was the lawful marriage between

⁹ *Zanelli v. Zanelli* (1948) 64 T.L.R. 556 (C.A.); *Sealey v. Callan* [1953] P. 135. The nullity decree given to the wife in the *Baindail* case (*supra*, note 6) was given entirely without reference to the question whether or not the courts of the husband's domicile would recognise it.

¹⁰ But not the Matrimonial Causes Act, 1950. R. 4 of the Matrimonial Causes Rules, 1950, required the giving of the date and place of marriage not so much as a matter of fundamental importance vital to proof of marriage as a recital to simplify proof and help in the keeping and checking of records: see *per* Singleton L.J. [1955] P. at p. 301.

¹¹ [1908] P. 355 (petitioner and respondent were validly married in an English register office; a few months later they went through a form of marriage in a church in Birmingham. The decrees nisi and absolute referred only to the Birmingham marriage. Sir Gorell Barnes P. ordered that the petition and decrees be amended by inserting in them the details of the register office ceremony). The decision was evidently cited to the Court of Appeal in the *Reder* case (*supra*, note 4).

¹² (1909) 25 T.L.R. 716. (There had been in 1904 a Scots marriage *per verba de praesentibus* between the parties but, doubtful as to its validity, they went through a second ceremony at the Sheriff's Court in Edinburgh in 1906. Later the wife petitioned in England for restitution of conjugal rights and subsequently for divorce. The two petitions, the restitution decree and the decree nisi all referred to the second ceremony only as the wife thought (wrongly) that the first ceremony was void. Before decree absolute was pronounced, the wife sought amendment of the divorce petition and decree nisi. Sir J. C. Bigham P., following the *Hampson* decision (*supra*, note 11), allowed amendment not only of these but also of the petition and decree in the restitution suit.)

¹³ Singleton and Morris L.J.J.; Hodson L.J. dissented and considered *Hampson v. Hampson* (*supra*, note 11) as wrongly decided: see [1955] P. at p. 309.

¹⁴ Under its inherent jurisdiction and by virtue of R.S.C., Ord. 70, r. 1.

the parties. The majority was willing to infer that when the commissioner had granted the decrees he had intended to dissolve the marriage which subsisted and that had there not been the error in the petition he would undoubtedly have dissolved the first marriage.¹⁵

In the light of the above case, perhaps Wrangham J. might (with all respect to him) have posited his rhetorical question thus: "The only question is: which *status* is it that has to be dissolved?" As Wrangham J. admits, even before the parties went through the English ceremony of marriage, English law would have recognised their status as married persons but would not have permitted either of them as an incident of that status to apply for a divorce in England. Consideration of the matter in this light imports the necessity of inquiring into the effect of the English marriage upon the prior Nigerian marriage—an inquiry which was made by neither counsel for the wife nor the court. If the English ceremony, not only in English law but also in Nigerian law, converted retrospectively the potentially polygamous-polyandrous marriage into a monogamous union, then should not the English decree have recited only the Nigerian marriage? The basis, however, on which the learned judge has proceeded is simply that for the purposes of divorce proceedings the parties were not possessed of the status of married persons until the performance of the London ceremony and that therefore the status thereby accorded must be the status changed by the decree absolute. Had he thought that the English ceremony had affected the Nigerian ceremony, then the only way to have got rid of the English marriage would have been to have had it annulled.¹⁶ As his Lordship did not take this view, he must have been content to leave entirely aside the question of what effect the second marriage had on the first and to take it as read that it was the second one which was valid so far as he was concerned. Such, then, is the casuistry into which we are forced by our obstinate

¹⁵ Singleton L.J. said ([1955] P. at p. 301): "It is important to bear in mind that the commissioner intended to dissolve a lawful marriage, to put an end to the status of married persons which up to that time existed between the wife and the husband: the date on which they were married was of importance, but it was not vital to proof of marriage."

It is, of course, one thing to correct an erroneous decree in order to relieve an ambiguous position, but it is entirely another to amend the effective part of it, *e.g.*, in relation to a question of status or proof of the matrimonial offence alleged. The court would not, as Singleton L.J. said (*ibid.*), permit amendments of the latter kind.

¹⁶ *Hewett v. Hewett and Dupin* (1929) 73 S.J. 402: there the parties married secretly (though validly) in a London church in 1918 and went through a second form of marriage in another London church in 1921. In subsequent divorce proceedings Hill J. was asked to insert a reference to the 1921 marriage in the decree. He refused, observing that it was people's own affair if they went through a second ceremony which could not be a marriage inasmuch as they were already married. He considered the 1918 marriage, which he had dissolved, to be the legal marriage, and that if it was desired to get rid of the idle 1921 ceremony, the court must be asked for a declaration of nullity, for he could only dissolve marriages and nothing else.

refusal to dissolve or annul actually monogamous but potentially polygamous and/or polyandrous marriages.

In the result, therefore, it was very fortunate for the wife that she promoted the idea of the London ceremony, for it was the celebration of that ceremony that enabled the judge to cut the Gordian Knot and put an end to her marriage. But for that marriage, she would have had to obtain a divorce valid according to her husband's domiciliary law and trust to recognition thereof by the English courts.¹⁷

P. R. H. WEBB.

THE INTENTION TO CREATE LEGAL RELATIONS

THE recent case of *Parker v. Clark*¹ shows that however well a legal principle may be established, its particular application to the facts may still give rise to litigation. The facts, which were not really in dispute, were that an elderly couple living in their own house in Torquay wrote to another much younger couple, the plaintiffs in the case, on September 25, 1955, inviting them to come and live with them. The invitation was issued on the basis that both couples should share in the maintenance of the house and that the landlords should contribute a television set, a car and the cost of the employment of a daily woman. The letter was sufficiently detailed to suggest that the difficulty regarding the plaintiffs' cottage, which would have to be given up, "can be solved by our leaving 'Cramond' and its major contents to Madeline, Mavis and Pamela [the wife plaintiff, sister and daughter respectively] when we both pass away and if you cannot maintain it they can sell out. Its present value is £9,000 to £12,000 without contents." As an inducement the same letter suggested that the plaintiffs could sell their cottage, pay off the mortgage and "invest the proceeds to increase your income."

The plaintiffs accepted the invitation and settled in the house in Torquay. About Easter 1957 a will was duly executed giving effect to the terms of the letter of invitation. However, a few months later it became clear that the owners of the house regretted the arrangement. After much unpleasantness and on being told that "there are other ways of getting you out" the plaintiffs eventually left the house in December 1957 in return for a cheque for £150 and a promise to pay removal expenses but, as the plaintiffs claimed, without prejudice to any of their rights under the original letter. A claim was made about eight months later and a writ was issued against the owners of the house on November 13, 1958.

¹⁷ Presumably an English court would have recognised a dissolution of the English marriage by means appropriate to dissolve a polygamous marriage afforded by the law of the husband's domicile—if, that is, it followed *El-Riyami v. El-Riyami* (*The Times*, April 1, 1958) rather than the so-called "Hammersmith Marriage Case" [1917] 1 K.B. 634 (C.A.).

¹ [1960] 1 All E.R. 93; [1960] 2 W.L.R. 286.

Two of the defendants' answers are of particular interest here. First, they contended that the correspondence between the parties did not disclose a serious intention to enter into legal relations. The parties had only made a friendly arrangement. Secondly, it was claimed that the letter of September 25 was not a sufficient memorandum under section 40 (1) of the Law of Property Act, 1925.

On all points Devlin J. in a reserved judgment found for the plaintiffs. While recognising that certain family arrangements of the type of *Balfour v. Balfour*² may not disclose an intention to enter into a binding contract, the learned judge relied on a dictum of Lord Lyndhurst L.C. in *Hammersley v. De Biel* that "if a party holds out inducements to another . . . and holds them out deliberately and plainly, and the other party consents, . . . a court of equity will take care that he is not disappointed, and will give effect to the proposal."³ It is clear that the courts have never accepted the proposition that friendship is an unsurmountable obstacle to the conclusion of a binding contract. In *Simpkins v. Pays*, for example, when the landlady refused to give a contributing lodger her share of the prize money of a newspaper competition, Sellers J. (as he then was) suggested that in friendly arrangements the test of a serious intention is "mutuality."⁴ A similar idea prevailed in the judgment of Devlin J. when he said: "There is, undoubtedly, in the arrangement a lack of formality on which counsel for the defendants greatly relies . . . it is easier to demand formal documents from a stranger than it is from a relation or friend."⁵ And he added later: "Because the terms of the defendants' offer was generous, one must not overlook the benefits which they were receiving . . ."⁶ such as domestic assistance, comfort and security. In other words, it may be more difficult to establish the existence of a serious intention when the bonds of kinship and friendship are involved but it does not follow that the courts will therefore refuse to uphold agreements that bear all the characteristics of a bargain. A similar rule applies to informal contracts.⁷ "There is nothing in the world," said Lord Greene in *Clifton v. Palumbo*, "to prevent an owner of an estate of this kind (valued at £600,000) contracting to sell it to a purchaser . . . on terms written out in a half-sheet of notepaper of the most informal

² [1919] 2 K.B. 571.

³ (1845) 12 C.P. & Fin. at p. 78, quoted by Kay L.J. in *Synge v. Synge* (1844) 1 Q.B. 466, at p. 469.

⁴ [1955] 3 All E.R. 10, at p. 13.

⁵ At pp. 100-101.

⁶ At p. 102.

⁷ Informality by itself is by no means fatal even when some of the terms of the contract have not been settled, provided that the agreement exists in its essentials. Both the Sale of Goods Act, 1893, and custom are often used to imply terms into incomplete contracts. See *British Bank for Foreign Trade v. Novinez* [1949] 1 K.B. 603. It is otherwise, of course, when there is doubt as to whether there is a contract at all.

description. . . . If they have done it, they have done it, however unwise or however unbusinesslike.”⁸ In this case the proposal contained in the letter of September 25 was informal but far from unbusinesslike, for it listed the financial benefits that the acceptance of the proposal would entail, such as a rent-free house, the increase in the plaintiffs’ income through the investment of the purchase price of their home and the security after the death of the plaintiffs for their sister and daughter. There was, therefore, ample evidence that the parties seriously intended to enter into a contract.

The other main submission that the letter was not a sufficient memorandum within section 40 (1) of the Law of Property Act, 1925, is also of considerable interest. It was based on the assumption that the memorandum is not sufficient unless an agreement was in existence before it was signed. Could a written offer constitute a sufficient memorandum? Counsel for the defendants relied on *Munday v. Asprey*⁹ in which the law was stated in these terms. It is noteworthy, however, that that statement was too wide as that court was only dealing with the specific point of an engrossment of a contract. Devlin J. expressed no opinion on this particular point but as a general principle he preferred the cases of *Smith v. Neale*¹⁰ and *Reuss v. Picksley*.¹¹ In the former the court found that a memorandum was not necessary but it was stated *obiter* that if a memorandum were necessary the written offer would be sufficient. In the latter case a strong bench, which included both Willes and Blackburn JJ., held that “As to this, it is clear both on reasoning and authority, that the proposal so signed and asserted to does become a memorandum or note of agreement. . . .”¹² The learned judge in this case was in no doubt that the letter of September 25 “was an offer and expressed as such.”¹³

It must be recognised that the interpretation of section 40 (1) of the Law of Property Act, 1925, has frequently been a source of confusion. A learned writer has spoken characteristically of the “wilderness of cases through which it is possible only to indicate the hazardous and inconsistent path trodden by the unwilling feet of litigants.”¹⁴ But in connection with the present case at least two principles clearly emerge. First, that the memorandum is not the embodiment of contract but evidence that may be obtained in the most devious ways.¹⁵ Secondly, there is respectable authority for

⁸ [1944] 2 All E.R. 497, at p. 499.

⁹ (1880) 13 Ch.D. 855.

¹⁰ (1857) 2 C.B.(N.S.) 67.

¹¹ (1866) L.R. 1 Exch. 342.

¹² At p. 351. The court there relied on *Coleman v. Upcot*, 5 Vin.Abr. 527; *Warner v. Wilmington*, 3 Drew 523; and *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139. Cf. also Chitty, *The Law of Contracts* (21st ed., 1955), Vol. I, § 266; Pollock's *Principles of Contract* (13th ed., 1950), at p. 130.

¹³ At p. 103.

¹⁴ Cheshire and Fifoot, *Law of Contract* (4th ed., 1956), at p. 157.

¹⁵ e.g., *Buxton v. Rust* (1872) L.R. 7 Exch. 279, where a letter repudiating all liability under the contract was held to be a sufficient memorandum.

the proposition that a written offer, which is acted upon as in this case, may be relied upon as a sufficient memorandum. Thus, in an early case it was decreed that an offer to pay £1,500 to the husband made prior to the marriage on condition that he marry the defendant's daughter was a good promise within the Statute of Frauds.¹⁶ This principle was also confirmed in *Watts v. Aims-worth*¹⁷ where the Court of Exchequer agreed unanimously that a written offer to buy a certain quantity of white globe turnip, which was acted upon by the offeree, was a sufficient memorandum.

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¹⁶ *Anon.* (1682) Skin. 142; 90 E.R. 67.

¹⁷ (1862) 1 H. & C. 83; 31 L.J.Exch. 448; 6 L.T. 252; 158 E.R. 810; see also *Lever v. Kaffler* [1901] 1 Ch. 543.

REVIEWS

THE CHILD AND THE COURT. By W. E. CAVENAGH. [London: Gollancz. 1959. 239 pp. 21s. net.]

ALTHOUGH from time to time articles have appeared in legal and sociological periodicals about the work of the juvenile courts, and there are sections on the subject in some of the textbooks, this is the first full-scale treatment of it which I have come across. The work of these courts has, of course, increased enormously both in quantity and importance with the disturbing increase of juvenile delinquency in recent years, so that the appearance of this work is timely. For it undoubtedly provides a helpful and valuable discussion both of the procedural aspects of the work of the courts, and of the human and sociological problems which continuously arise in them. Mrs. Cavenagh has not only been a magistrate, working in juvenile courts, for a number of years, but she is a trained and experienced social worker of eminence in that profession, having been Chairman of the Association of Social Workers. She is therefore doubly qualified to write on juvenile courts.

The book should be a great boon to those who are actually working in these courts, and indeed to magistrates generally. Mrs. Cavenagh has the ability to communicate the result of her experiences in a clear and helpful manner, her whole treatment of the subject is enriched by a ripe wisdom which she places at the disposal of her fellow magistrates unstintingly. Her work should also be most helpful to administrators and politicians who are, or should be, concerned to bring about improvements in our far from perfect system for handling the problem of juvenile delinquency. Indeed, her observations, based on wide reading as well as her own experiences, are often so statesmanlike in character that they must receive careful consideration at the Home Office when new legislative projects are under discussion.

I do not, however, feel that the book can be unreservedly recommended to new magistrates, or others coming into this subject as a new field. Although Mrs. Cavenagh has an unusual ability, for a lay magistrate, to understand and appreciate the legal point of view and atmosphere, she finds it difficult to stand outside her subject in the way that is required for a clear and well-balanced description of any legal or political institution. In the result I think that most people coming new to the subject would get a confused and confusing impression of the system under description. And this would probably be accentuated by Mrs. Cavenagh's unfortunate tendency to repetition.

These weaknesses are exemplified in the first two chapters, which are intended to give an introductory account of the work of an ordinary magistrate's court; no doubt a very necessary preparation for what is to follow. But Mrs. Cavenagh never quite succeeds in doing this. As she goes along she has ideas both about the work of the ordinary courts and of the juvenile courts which she cannot resist discussing. These ideas are, it is true, usually very much to the point, and as I have already suggested will prove of much interest to experienced magistrates, but they do obscure the clarity of the picture which our author is at such pains to paint.

The substance of the book consists in four excellent chapters in which the procedure, the powers, the practical working and, finally, the sentencing powers of these courts are dealt with: these take up rather more than half the volume. As I have already indicated, there is a great deal of illustration from actual cases with which Mrs. Cavenagh has herself been concerned, or which she has collected from the pages of the *Magistrate*, *Probation*, or one

of the other periodicals concerned with these matters. This is one of the reasons why her book should be so helpful to magistrates working in these courts. In many rural parts of the country juvenile courts sit only rarely, the outburst of juvenile delinquency being largely an urban phenomenon, and it is a worrying aspect of the system that so many of the justices administering it have but little practical experience. These, in particular, should get much help from this book.

Mrs. Cavenagh concludes with chapters on the Child and the Court, and the Court and Social Services. In the former of these there is an acute discussion of what is, I think, the central problem in the handling of juvenile delinquency, that is whether it should be dealt with as a crime by a court, or as an educational difficulty by some social institution. This matter, which is of profound relevance, has never been properly faced up to in this country either by legislature or executive. It crops up from time to time in the earlier chapters of this book, but in this chapter the author sets out clearly and objectively the arguments on either side without coming down decisively one way or the other, though she is inclined to favour "the sphere of the social services rather than of the penal system."

One important aspect of this same problem which is clearly brought out (in one of the earlier chapters) is the different interpretations placed upon section 44 of the Children and Young Persons Act, 1933, which provides that "every court shall have regard to the welfare of the child." One view of this is that the welfare of the child must be "the first consideration." Another is that "it contains nothing new"—the welfare of the offender "whether adult or juvenile" being one of the matters to which the court must always have regard. No guidance seems to have been given on this matter by the High Court and yet it is obviously one of fundamental importance in the work of these courts.

Much of the final chapter is taken up with the work of the Gluecks on prediction, and the amount of consideration given to the part played by the social services is a little disappointing, especially in view of the author's eminence in that world. She does, however, bring out the very real difficulty caused by the fact that the handling of juvenile delinquency on a penal basis effectively separates it from the educational and other essential elements of the social services, and it is probably this fact which in the end inclines her to favour a transfer to "the social sphere."

But she does not feel that the existing social services are adequate to the task of coping with juvenile delinquency which she finds stems back almost invariably to inadequacies in the family. Her own rather tentative proposal would be for the setting up of a new service, or perhaps the reconstruction of an old one, so as to provide for the guidance and assistance of families when in need. Mrs. Cavenagh is too experienced and wise a person not to be aware of the very great difficulties in the way of her proposal. Yet so much is effectively done already on these lines by probation and children's officers working in co-operation that one cannot but feel that some positive steps on the lines suggested by her might lead to a really spectacular advance.

One of the matters which disturb Mrs. Cavenagh is the role of the police in our magistrates' courts system. The police really run the courts, which explains why it is so difficult to break down the inveterate and not unreasonable habit of calling them "police courts": even in the higher courts the police seem to take a predominant part in the administration, and I have even heard of a policeman choosing their foreman for a jury which was being a little indecisive about the job, for it seems inevitable that the jury room should be in charge of a constable!

It is probable that much less practical harm results from this police dominance than might be expected, since we have a police force which, on the whole, is not only uncorrupt and sympathetic, but not aggressive for power. Nevertheless, the system is not really defensible, and may well have much more serious psychological and moral influences on a large but inarticulate section

of the population than is commonly suspected. It is right that Mrs. Cavenagh should voice these fears, in particular that she should comment on the police supervision schemes which have come into operation in various parts of the country in modern times. Under these a chief constable or a superintendent himself decides on the guilt of an alleged culprit, and if he thinks fit puts him under police supervision instead of bringing him before a court. This practice was adversely criticised by the Committee on Young Offenders of 1927, but it still exists, and Mrs. Cavenagh refers to an illuminating example of how it may work in practice by a quotation from the police history given of a young offender for sentencing purposes in which, under a heading "Previous Offences," there appeared items of "larceny" and "stealing from a meter" although such charges had never been preferred in any court!

Mrs. Cavenagh is, of course, not unaware of the great advantage there may be in most cases if a child can be kept out of court, especially from the point of view of avoiding a record of conviction which may prove so damaging to his future career. But this supervision method as it stands is too much open to objection to be allowed to continue, and should be replaced by an acceptable alternative process. Mrs. Cavenagh sums up the matter pithily in the statement, "there are serious objections to any scheme which implies that the police have authority and rights over the citizenry in matters outside the purview of the courts."

Mrs. Cavenagh has sensible things to say about a number of other aspects of the present system which space prevents my discussing. There is so much meat in her pages that the absence of an index is an important omission.

C.

ALEXANDER MACONOCHIE OF NORFOLK ISLAND. By THE HONOURABLE MR. JUSTICE JOHN VINCENT BARRY. [Melbourne: Oxford University Press. 1958. xxii and 277 pp. (with index). Price (in the United Kingdom) 50s. net.]

STUDENTS of penology have long awaited this full-length study of Alexander Maconochie, whose stature as a prison reformer has been more and more recognised of recent years. They have not waited in vain, for this admirable study by an eminent Australian judge gives them what they need to know of the life and work of one who was a real pioneer in the solution of penal problems. It is a pity that its substantial price is likely to put it beyond the reach of many who would profit by its perusal. As Professor Glueck says in an appreciative Foreword: "there is hardly a reform in the correctional field in our epoch than cannot be traced, at least partially, to the fertile imagination of Maconochie." Nor, as Mr. Justice Barry shows, is "there a single basic idea among the standard minimum rules adopted in 1955 at Geneva by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders which had not been anticipated by Maconochie a century earlier."

Alexander Maconochie's early life had shaped him for a prison reformer even less than had that of the great John Howard himself. He was a naval officer of that substantial class whom the termination of the Napoleonic Wars rendered redundant, and retired in 1815 with the rank of post-captain. Having a small pension and some private means, he devoted his considerable energy and keen intellect first to the improvement of his education, being a typical Scot of the period, and then to various social activities, of which the most important was helping to found the Royal Geographical Society, of which he became the first secretary.

As with Howard, his introduction to penological problems was largely accidental, for having accepted the position of private secretary to his old comrade in arms, Sir John Franklin, afterwards to become famous as an

explorer, but from 1837 onwards governor of Van Diemen's Land (Tasmania), he was asked by the Society for the Improvement of Prison Discipline to prepare for them a report on the convict transportation system then operating in the island, as well as, of course, in other parts of Australia. Up till then he seems to have had no special interest in this problem, though he must have been aware of its main aspects as it was a subject of prime concern to Englishmen of his generation.

He threw himself into the investigation of the convict settlements in Van Diemen's Land with characteristic energy and thoroughness, and during the course of his inquiries he trod on the toes of the various vested interests in the island who succeeded in embroiling him with his old friend the governor. Indeed, Maconochie's principal weakness seems to have been a certain tactlessness, even quarrelsomeness, a trait sometimes found in persons of his sanguine temperament. Already while Secretary of the Geographical Society he had come into violent conflict with one of the Vice-Presidents, and although this dispute was resolved in his favour it was a forerunner of a number of others out of which he did not emerge quite so successfully.

Maconochie's report on the penal settlements in Van Diemen's Land was most damaging, not only to them, but to the whole system, and was a contributory factor to its discontinuance. It earned him, in addition, the post of superintendent of the convict settlement of Norfolk Island, a post which he held for four years (1840-44), and upon the administration of which his claim to fame principally rests.

Norfolk Island is a small island some distance off the coast of New South Wales, from which at that time it was several days' sailing distance. It had been used off and on as a prison for the worst type of convict, and its history both before, during, and after Maconochie's time was marked by mutinies, attempts at escape, and much violence and loss of life. According to Mr. Justice Barry's careful analysis of the facts during the period of his governance, Maconochie succeeded much better than any other governor, but this has not been the general verdict of the historians who seem to have been led astray either by partiality for Sir John Franklin or by a superficial study of the official documents. However, appraisal of the success of the superintendent's efforts was difficult enough at the distance of Sydney let alone in London, while it is clear enough from his own dispatches that in his enthusiasm for putting his own projects into practical effect he disregarded the instructions which had been given to him at the time of his appointment. His freedom of action had been severely circumscribed by these, for the Government, while choosing him because of the ability of his Van Diemen's Land Report, had at the same time been sufficiently scared of the originality of the ideas which it contained to determine to circumscribe narrowly the extent to which it would permit him to put them into operation. In the result he was dismissed in disgrace.

However, the leaders of the reform movement in England were aware of Maconochie's work and took a very different view of it. One of them was Matthew Davenport Hill, Recorder of Birmingham, member of a remarkable family which includes among its members Rowland Hill of postage stamp fame, and Octavia Hill, one of the founders of the National Trust and an outstanding housing reformer. M. D. Hill used his influence to obtain for Maconochie the governorship of Birmingham prison which he held for two years (1849-51). Here he was less successful than on Norfolk Island. Devoting too much of his time to propaganda to pay attention to the detailed work of the prison, he was deceived and frustrated by the actions of his deputy, who succeeded in turning against him the majority of the magistrates who controlled the prison at the time. He was again dismissed from his position. One cannot help feeling that on this occasion he had brought his troubles largely upon his own shoulders—for a certain "fanaticism," already noticeable in Norfolk Island, was clearly now dominating his actions.

Although he struggled on with his work of reform for several years, shattered health, and pecuniary difficulties deprived him to some extent of his old élan. He died in 1860.

By then the great period of reform and enlightened penal discussion which makes the early Victorian period and the few years before her accession so attractive to the historian of the criminal law had come to an end, and the period of harsh measures and rigid discipline which lasted into the twentieth century, and which was opposed to everything for which Maconochie had stood, had set in. It is interesting to compare his fate with that of John Howard, a far less original thinker and by no means such an attractive personality, who was commemorated by a monument in St. Paul's Cathedral, and had both a national and an international reputation as a philanthropist.

Space permits only the shortest of appreciations of Maconochie's ideas and work which are, however, most attractively and sympathetically described and discussed in this book. He is most famous as the originator of the "marks" system of prison discipline under which a convict could obtain remission of his sentence according to a rather elaborate scheme of marks, awarded for good conduct. This has, of course, been adopted in a rough-and-ready way in the modern prison system under which a prisoner earns remission of up to a third of his sentence, provided he does not forfeit this by bad conduct. Maconochie's own proposals, which were more positive and dynamic, do not appear ever to have been put into practice. Even so, he regarded this aspect of his system as secondary and subordinate to his main principle of action which was quite shortly the exertion of simple moral influence.

He was completely modern in that he gave precedence to the reformation aspects of prison discipline over the deterrent and retributive which then and for long were in the ascendant with the authorities, as well as of course with the general public. Gipps, the able governor of New South Wales, who was his immediate chief, commented characteristically when he wrote: "such an opinion, however agreeable it may be to the dictates of humanity, is not, I believe, the received one of legislators." Maconochie recognised that fear operates within narrow limits ("he only dreads punishment when he sees the lash in hand") and harsh methods make men "incapable of moral restraint." On Norfolk Island he was able by his personal influence to secure the repentance and regeneration of several of the worst convicts, for he did not scruple to establish direct contact with the most vicious of his prisoners: and indeed he claimed that recidivism among the convicts who had come under his régime was of unusually small dimensions. It is interesting to observe that one of the most modern and promising of experiments carried out by our own Prison Commissioners, that at Norwich Gaol, depends on the same kind of moral influence; which demands, of course, exceptional personal qualities on the part of the prison officers. This "use of moral influence rather than physical coercion," says Mr. Justice Barry, "was the fundamental concept of Maconochie's system."

He was indeed very much alive to the importance of the part to be played by the subordinate prison officers in all attempts at reformation, and commented severely upon the state of affairs existing in Norfolk Island when he arrived there under which "servile marks of respect had to be paid not only to officers, soldiers and generals but even to the empty sentry boxes." By such a régime the prisoners' "feelings were habitually outraged and their self respect destroyed." Practices of this kind in foreign lands we should describe as Prussianism—it is salutary that we in England should realise how nearly our own methods have approximated from time to time to that hated system. Mr. Justice Barry makes a profound comment on the effect of such conduct by the prison authorities when he observes that "men cannot pity those they have oppressed."

Maconochie was a prolific writer. He seems to have formed most of his views on penal reform during that short period of intense mental activity

which he spent in Hobart, and from that time on almost until the day of his death he poured out his views in a series of pamphlets and articles. His best-known and longest work, *Crime and Punishment*, was published in 1846: it largely consists of a collection of his earlier writings. Its pioneer influence was noticed by the Webbs in their great work on English prisons, and Mr. Justice Barry's claim that it has "exercised an immense influence on the development of penology as a science" is well justified.

One is again and again impressed by the modernity of his opinions: many passages could be quoted from his writings which might have been written in 1960. Thus with an unerring insight he puts his finger on the essential weakness of the reformatory school—its endemic institutional character which plays up inevitably the influence of the worst pupils. He would have subscribed to the view that offenders should be kept out of institutions, whether prisons, reformatories or approved schools, till, and beyond, the last possible moment. And always he comes back to the responsibility of society for the criminal elements in its midst; those elements for the making of which it is so largely responsible, and which it cannot hope to be without until its citizens as a whole show a greater understanding and sympathy with the difficulties of their weaker brethren. Maconochie's "great strength lay in his recognition that vindictive punishment was injurious to the victim and to society," and in this emphasis on the responsibility of society he was certainly in advance of his age, if not of later generations. But as his biographer observes, if in our punishments, and indeed in our subsequent attitudes to ex-prisoners, we "deny their human qualities" this "denial of their humanity draws with it a denial of that of society itself."

C.

ARCHBOLD'S PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES.

Thirty-fourth edition. By T. R. FITZWALTER BUTLER and MARSTON GARCIA. [London: Sweet & Maxwell, Ltd. 1959. cxevi and 1719 pp. (including index). £5 5s.]

As the learned editors point out in the Preface, "*Archbold* is, and is intended to be, a practitioner's and not a jurist's book," and it is by this standard that it should be judged. It cannot embark upon lengthy discussions of points of criminal law of theoretical interest, such as can be found in the writings of Dr. Glanville Williams and Mr. J. W. Cecil Turner. This simply repeats the point made by the same editors in the Preface to the previous edition (reviewed by the present reviewer in this journal: 18 M.L.R. 428 (July 1955)). The editors go on to say that much important new legislation affecting the criminal law has had to be incorporated in the present edition, such as the Sexual Offences Act, 1956, and the Homicide Act, 1957. Also the effects of recent decisions on affray and conspiracy as well as an unusually large number of decisions on matters of procedure and evidence have had to be taken into account. In order to keep the book a reasonable size, the editors claim to have consciously jettisoned some very old authorities where there appeared to be a more modern authority relating to the same point, and also they have made some deletions where the law as previously stated has become in practice obsolete.

Two questions arise from these prefatory remarks of the editors. How well has the new statute law been incorporated? As far as the Homicide Act, 1957, is concerned, the treatment cannot be regarded as satisfactory. For example, the important section 3, dealing with provocation, is simply spliced onto the old material without any comment or explanation. Paragraph 2486 on p. 945 contains the rather droll statement that "as there are many nice distinctions . . . upon this subject of malice, express and implied, it may be desirable to consider the subject more fully under the following heads . . ."

and there follows the most meaningless jumble of headings, including suicide and manslaughter of the voluntary kind, which adds to the general confusion. Surely, if anything is desirable, it is a careful analysis of the case of *Vickers*, which is not mentioned at this point but receives a brief paragraph of its own at p. 959 (para. 2515). How anyone could ever make sense out of this chapter without having learned his law first from some other source is a question for consideration. But then, *Archbold* is for practitioners, and presumably they know their way through it.

The second point is that, although there has been some pruning of obsolete law, there is no doubt a great deal that remains in need of deletion. The court in *R. v. Watson & Watson* (1959) 43 Cr.App.R. 111 came upon one such section, in connection with homicide by neglect. Must we wait for judicial decisions before further drastic pruning takes place?

We note with satisfaction that the spelling of *R. v. Weiow* has been corrected at para. 3802 and in the Index, but not, alas, in the note at the foot of p. 25. The following cases, referred to in the previous review, are still cited without any comment, not even the cautionary injunction *sed quaere*: *Walters v. Lunt*, *R. v. Bourne* (1952), *Gott v. Measures*. To these we may now add *McGregor v. Benyon* and *R. v. Davenport*. *R. v. Matheson* could have been mentioned at para. 929 as well as at para. 2473. *Younghusband v. Luftig* is not mentioned at all in para. 47 or anywhere. *R. v. Russett* is described as a strong case in para. 1491. Whether a boy under fourteen can be convicted of attempted rape might be discussed at p. 13. The discussion of the criminal liability of a corporation in para. 23 could be improved by bringing out more clearly the principle upon which liability now rests. The references to *R. v. Steane*, described previously as inadequate, are now improved.

J. E. HALL WILLIAMS.

INTRODUCTION TO JURISPRUDENCE. By DENNIS LLOYD, M.A., LL.D.,
Quain Professor of Jurisprudence in the University of London.
[London: Stevens & Sons, Ltd. 1959. xxiv and 472 and
(index) 10 pp. 45s. net.]

THIS new book on jurisprudence is to be welcomed as a bold attempt to break away from convention and to combine the better features of the usual English kind of book on the subject, a narrative exposition of the main problems and topics of jurisprudence, embodying a secondhand commentary by the author on the views of the main jurists and legal thinkers, with the considerable merits of the American-style volume of Readings, comprising a selection of reprinted passages from books, periodicals and cases. The great difficulty which the author of this book has had to face, quite inevitably, is that, within the conventional limits of size and price for a students' textbook, he could not possibly deal with all the topics included in the ordinary course on jurisprudence, nor include anything like all the passages bearing on any one topic which he might have wanted to include or which it might be ideally desirable for the student to read. To that extent the claim made on the inside of the dust-jacket, that the book gives a comprehensive view of the subject, is unjustified. For the book covers only what may be called Legal Theory.

It comprises eleven chapters, each having about ten pages of introduction by the author, followed by some twenty or thirty pages of extracts from juristic writings and cases. After the two introductory chapters, and apart from the last one, on the judicial process, each deals with the views of one of the so-called schools of jurists. There is nothing about the analysis and classification of the law, little about the sources of the law, and nothing about fundamental legal conceptions. These exclusions have been necessitated by the exigencies of space, but it follows that for use in the ordinary kind of course

on jurisprudence this book will have to be supplemented by others. It may be also that the book is incorrectly named, as it does not cover anything like such a wide field as is usually connoted by the term "jurisprudence" today. But the choice of topics does concentrate on the branch of the subject most neglected in England hitherto and indicates a welcome swing away from excessive attention to analysis.

The arrangement of the chapters does not seem entirely happy; it is, naturally and rightly, roughly chronological; but Custom and the Historical School might more suitably have come before The Sociological School, and some may feel that the chapter on The Judicial Process is fitted in at the end rather than following logically; it might well have come much earlier, after The Meaning of Law, on the basis that it is to a large extent the difficulties met with in the execution of the judicial process which provoke lawyers to think about the nature of law.

The extracts are well chosen, revealing greater catholicity of taste than is usual; it is not every teacher of the subject who ransacks *Mind* and the *Proceedings of the Aristotelian Society*, but it is a practice to be commended. Again, the author is undoubtedly right to have preferred substantial extracts, of several pages, to mere snippets, even though this diminishes the number of jurists and philosophers who can be quoted. Lists of Further Reading at the end of each chapter would have been useful to the student whose appetite had been whetted, and would have given him a signpost to those other excerpts which could not be included. The length of the excerpts is such that the student can gain a fair impression of the style and mode of argument of the original writer, and this is one of the most valuable features of the book. It does go some way to counter the danger, so common in jurisprudence, of students relying entirely on potted secondhand accounts of other men's ideas, without reading a word written by the man himself. It is not difficult to think of passages from other writings which might have been included, but the task of selection is always an anxious one and also a personal one; it suffices to say that the reviewer was not struck by any gross omissions, and was struck by some unexpected and valuable inclusions.

The author's introductions to each chapter are, however, rather less satisfactory; they serve merely to introduce the extracts and are too brief and sketchy to be adequate by themselves, and leave too much unsaid. Natural rights, for example, deserve more than a footnote mention. On this point also, therefore, the book will need to be supplemented by the reading of other narrative works and other commentators.

There are only a few misprints, mostly in the footnotes, though one (p. 215) completely spoils the effect of Jerome Frank's witticism about neglecting the importance of juries, by printing "jurisprudence" for what should be "juries-prudence."

Within its self-imposed limitations, however, this book is a very valuable addition to the corpus of texts available for students, by whom it should be, and is certain to be, widely used, and there are many graduates who also would profit from reading it.

DAVID M. WALKER.

GENERAL PRINCIPLES OF THE LAW OF TORTS. By PHILIP S. JAMES, M.A. [London: Butterworth & Co. (Publishers), Ltd. 364 pp. and index. £1 12s. 6d.]

THIS is a work "intended to explain essentials only," as the author says. Hence it must be judged in terms of what such a book should achieve. However, there is a difficult and interesting preliminary question. What are "essentials"? To the tort lawyer this is a particularly pregnant question, for it goes to the very heart of the whole subject. A survey of the several books

on torts which are available to student, practitioner, and jurist, shows that it is not easy to refine away from the mass of detail in decisions and dicta the essentials, the core of legal principles which must be grasped in order to appreciate the general nature and scope of this part of the law. Indeed, it can be argued that it is in the details that the general principles of the law of torts lie: or, to put it in another way, that there are no general principles worthy of being extracted, since they can all be summed up so very shortly that they are misleading, if not meaningless, unless they are subjected to a thorough analysis, which involves much detail. This, of course, is a fine, thought-provoking jurisprudential point. But it is of no assistance to the student of torts, or anyone writing a book for such a student. Somewhere there is a limit to the amount of material such a book should contain. The question is: where? More pertinently to this review, the question is: has Professor James provided too much or too little?

The answer to that question really depends upon the public for whom this book is intended.

Professor James appears to indicate that it is meant for "the less aspiring student." Hence his injunction to adhere to the text and refrain from pursuit of the references in the footnotes, of which there are many. The "aspiring honours student" will not find in this book the fullness of discussion which he might justifiably expect in a textbook. The book is an *elementary* book, which provides a plain statement of the law, not embellished (or bedevilled) with theory, argument, speculation, or criticism. Though the whole field of tort law is examined, the topics are not treated discursively. On the contrary, only the bare bones are given, even where the subject is one of complexity and has given rise to much controversy, for example, liability for causing nervous shock (see p. 142).

Perhaps this desire on Professor James's part to present the law as baldly as possible, without what he would consider unnecessary complexity, made him refuse to group the various torts under any particular headings. Instead, in Part II, the reader is presented with twenty-one chapters of "particular torts," unrelated to each other in any way. Yet, in keeping with modern ideas, it might be thought more explanatory to attempt to organise the presentation of the various torts in some more scientific or logical order. There are other criticisms which can be made of the scheme of the book. Why is the chapter on "Torts committed abroad" in the Introductory portion of the book? It might be better to include it in the final section of Miscellaneous Matters. Chapter Five of Part One (which deals with the effect of death or bankruptcy on causes of action in tort) belongs really with the chapters in Part Three on waiver of tort, and limitation of actions, and the chapter in Part Three which treats of statutory liability for causing death could come perfectly reasonably in the section of the book dealing with particular torts.

Another illustration of the way Professor James has fulfilled his plan to produce an elementary textbook is provided by his treatment of cases. Throughout the book, propositions are illustrated by the provision of digests of cases (one hundred and thirty-eight in all), apart from the references in the footnotes. The references, according to the author, may be consigned to oblivion, except by the honours aspirant, or, as Professor James would like, the practitioner. On the other hand, the "illustrations" contain extremely useful summaries of the cases cited, and cannot fail to assist the student. Their disadvantage is that they may tempt the student not to read the reports, which is a bad habit to encourage. For it is surely the business of the student to familiarise himself with the techniques of the common law, *i.e.*, with the way in which the judges create legal principles. What more suitable subject can be found to illustrate this than the law of torts? The cases are intrinsically interesting: the facts are usually easy to follow and assimilate: the arguments striking and clear: the decisions involve matters which can be generally understood, as well as legal technicalities. Yet one can see Professor

James's point. For it can be argued that there is nothing essentially unwise in discouraging students who are beginners from overmuch indulgence in the reading of cases, in that confusion and uncertainty can result. On the other hand, the more intelligent and zealous student can always let his eye stray to the bottom of the page, find the appropriate report, and pursue the point further. Nothing has been lost by the brevity of the text: and something has probably been gained.

The absence of comment is also very significant of the purpose of the author. For the style of the book suggests that the law of torts is both clear and settled. On many points this is doubtless true. But there are obvious matters which are far from agreed: and many cases which have produced heated disputes. Professor James, seeking to satisfy the elementary student, ignores this. Discussion, as already noted, is absent: comment on cases is rare. Professor James has refused to let his own personality creep into the text. It does, however, very circumspectly, when he is writing about contribution between tortfeasors, when he calls the decision in *George Wimpey & Co., Ltd. v. British Overseas Airways Corporation* one "that must rank among the most unhelpful."

Again in keeping with the elementary nature of the book is Professor James's refusal to refer to periodical literature. The argument here is that articles therein may be contributions to learning, and to the understanding of the law, but they are not a *source* of law: and it is only with sources of law, *i.e.*, English law, that he is concerned. For an elementary textbook this is possibly a reasonable omission. Yet even in such a book, it is suggested, there is a place for such references, particularly if the more aspiring student (and the practitioner) are to be encouraged to read and use the book.

This brings us back to the very crux of the whole matter. What is the value of what Professor James has done? As an elementary study of the law of torts this book is useful and admirable. The text is always clear: the individual chapters are well organised: the references are kept out of the way, but are full and very up to date. To what extent, however, is there a place today for an elementary textbook of torts? Can such a book provide anything which is not available in the classical works (*Pollock, Salmond and Winfield*) or the more modern treatment of Professor Street? With all respect to Professor James, it is unlikely that his book will appeal to practitioners as a source book for the answers to their problems. It is far too bare to do that. But, that very bareness may attract those students who seek to acquaint themselves with the outlines of the law of torts in an easily assimilated form. If this does happen then Professor James will have achieved his purpose: he will have satisfied a need.

G. H. L. FRIDMAN.

THE LAW OF TORTS. Second edition. By HARRY STREET, LL.M., PH.D. [London: Butterworth & Co. (Publishers), Ltd. 1959. £2 15s.]

THE reviewer of the first edition of *Street on Torts* (19 M.L.R. 319) wrote: "It can be said at once that *Street on Torts* is a good book and the second edition (if the author pays attention to his critics!) will probably be a great book." The second edition has now appeared. The author has certainly paid attention to his critics if he has not always gone the whole way with them. And the book has already taken its place beside *Salmond* and *Winfield* as one which can be thoroughly recommended to students. The logical arrangement of the subject with its stress on the interests of the plaintiff makes it ideal both for teachers and their pupils. Some criticism was made of the fact that the author dealt (as he still does) with defences such as remoteness of damage and contributory negligence in the part of the book dealing with negligence, whereas these defences are equally applicable to other torts. But there are

ample reminders and cross-references in other parts of the book and the arrangement seems to this reviewer entirely satisfactory.

Professor Street deals efficiently and lucidly with the Occupiers' Liability Act, 1957. He has also undertaken some rewriting of the section dealing with invasion of the economic interests of the plaintiff, one of the best parts of the book. One or two minor criticisms could be made of this new material. It is not clear exactly how Professor Street reconciles the proposition on p. 189 that under the Occupiers' Liability Act, 1957, the occupier of premises owes a duty of care to persons exercising a private right of way with the statement in the footnote that the owner of the servient tenement has still no obligation to repair. Recent cases limiting the right to use one's own name for trading, particularly *Wright, Layman and Umney, Ltd. v. Wright* (1949) 66 R.P.C. 149 (C.A.), are not mentioned (p. 370). Nor is it easy to follow Professor Street's doubts (pp. 359, 361) how far withholding or threatening to withhold supplies for the purpose of enforcing price maintenance contrary to section 24 of the Restrictive Practices Act, 1956, gives rise to a civil right of action. Although section 24 (7) does not in so many words give such a right, the fact that no criminal liability is involved strengthens the view that civil proceedings for breach of the statute would lie. And since a breach requires that two or more persons should combine to damage the plaintiff's business by unlawful acts, it is difficult to see why there should be any doubt that a tort is committed independently of malice. The right of the Crown to obtain an injunction is not mentioned; nor are the parallel provisions of section 11 of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948.

A more general comment is that the very logicity of the author's exposition may make the law seem more rational than it sometimes is, and that he does not spend much time in criticism of the existing law from a sociological viewpoint. For instance, his treatment of *Searle v. Wallbank* [1947] A.C. 341 (liability for animals straying on to the highway) is very brief, whereas *Salmond* and *Winfield* both debate at length the desirability of reform. Professor Street is content to refer to the Committee on Animals. Perhaps it is as well, for Professor Winfield's view that the incursions of dogs (as opposed to cattle) on the highway "are fraught with small risk to traffic" hardly tallies with the Ministry of Transport's statistics that in 1958 alone 2,731 accidents causing death or injury to human beings involved dogs. (As the law stands it would seem that if the dog strays onto a busy street without its owner there is no liability, but if the owner takes it out off the lead he may be liable in negligence.)

Such controversial topics as the right of privacy are very lightly touched upon without reference to all the meagre authority available. Professor Street's questions more often relate to nice legal points ("Is it battery if A pulls away B's chair as he is about to sit on it, whereupon A falls to the floor?" "Can you imprison by telephone?"). Nevertheless, by concentrating on the question what interests of the plaintiff are protected by the law of torts the author does give the reader a clearer picture of the underlying social objects of this branch of the law than do other textbooks and the objection that he is not sufficiently critical of anomalies should not be carried too far. If not yet a "great" book it is certainly a very good book indeed.

JOHN MONTGOMERIE.

PRINCIPLES OF COMPANY LAW. By ROBERT R. PENNINGTON, Solicitor, Reader at the Law Society's School of Law. [London: Butterworth & Co. (Publishers), Ltd. 1959. xci + 626 + (index) 35 pp. £2 10s.]

THIS is a new book on the subject of company law which its author states to have been written primarily for students. It is, in fact, a good deal longer

than any subsisting student's book on the topic. But the more successful students should long ago have discovered a long textbook means less work and not more for the student, at any rate if the textbook is a good one. And this one is good. It may take the student many hours of study to read it through, but the time will surely not have been wasted. Its particular merits are first that it concentrates on principles, which are the important things to try to commit to memory, and secondly that the author is not content with making a dreary catalogue of statutory requirements but sets out to reduce them to a rational whole. Examples of this are the treatment on pp. 170-173 of the requirements of the Fourth Schedule to the Companies Act, 1948, as to the contents of a prospectus, and the treatment on pp. 308-311 of the charges that are registrable with the Registrar of Companies. Taken all in all it is an excellent student's textbook.

But this is not all. A good student's book is invariably useful to practitioners, especially when dealing with topics on which the law is uncertain, whether the practitioner agrees with the author or not. There is, for instance, an interesting discussion in Chapter 19 on the rule in *Foss v. Harbottle* (1843) 2 Hare 461. It would seem that the author's view is that the recent decision of *Pavlides v. Jensen* [1956] Ch. 565 cannot be reconciled with principle and therefore must be wrongly decided. If this is a fair interpretation, then one reviewer certainly agrees with the author. It may be that section 205 of the Companies Act, 1948 (first introduced into company law in 1929), has altered the law in this respect, since the rule was first stated. The law, if the decision stands, is most regrettable and perhaps will be considered by the Committee that is about to review company law. The author would no doubt support this suggestion.

The book is a welcome addition to the literature on the subject and we wish it the success that it deserves.

J. G. MONROE.

COMPANY LAW THROUGH THE CASES. By H. R. HAHLO, assisted by ELLISON KAHN. [Johannesburg: Juta & Co., Ltd. 1958. xxxii and 440 pp. 9ls. 6d.]

THERE is no English case-book on company law. Until that omission is remedied, the present book may (apart from its high price in England) be enthusiastically recommended. It consists of a selection of some 350 cases, South African, English, Scottish and American. Each group of cases is prefaced by a short introduction putting the cases in context and referring to the appropriate provisions of the South African Companies Act, No. 46 of 1926.

The selection and presentation of cases have been largely governed by the students Professor Hahlo has in mind: "more especially students of commerce and accountancy." "It has always appeared wrong to me," says the author, "to refer my commerce students to cases when I knew full well that most of them, for practical reasons, would not be able to look them up." But this in no way detracts from the value of the book to law students (and teachers), for the selection of cases is wide and most of the well-known authorities are represented.

Two omissions may be noted. Winding up does not appear—understandably, for most cases have done little more than interpret isolated statutory provisions, and even if the topic is within a student's syllabus it scarcely lends itself to the case-book method of teaching. (Though *Re M. Kushler, Ltd.* [1943] Ch. 248 would have been a useful case to include.) More important to English readers is the absence of the important cases on pre-incorporation contracts, *Kelner v. Baxter* (1866) L.R. 2 C.P. 174, and *Newborne v. Sensolid (Great Britain) Ltd.* [1954] 1 Q.B. 45. This omission is due to the recognition by South African law of the contract made for the benefit of a third party

(the so-called *stipulatio alteri*), and to section 71 of the South African Companies Act, which enables a company to ratify a pre-incorporation contract in certain circumstances (a section which will doubtless be considered by the Jenkins Committee).

AUBREY L. DIAMOND.

A SIMPLE GUIDE TO NEGOTIABLE INSTRUMENTS AND THE BILLS OF EXCHANGE ACTS. Second edition. By DUDLEY RICHARDSON, A.I.B. [London: Butterworth & Co. (Publishers), Ltd. 1958. x + 184 (index 4) pp.]

THIS book as its title suggests is an elementary introduction to the Bills of Exchange Act, 1882, and cognate statutes. It is intended primarily for students sitting for the examinations of the Institute of Bankers and working on their own without having had the advantage of a preliminary study of the common law. It will be obvious enough to those conversant with this difficult branch of the law that the author has set himself a difficult task and he is to be congratulated on having accomplished it remarkably well. The scheme is the familiar one of a section by section examination of the principal statute and of the recent Cheques Act, 1957, the discussion of which provides the principal new feature in this edition. But, before embarking on this analysis, Mr. Richardson provides three chapters on Common Law and Equity, Choses in Action, and the Negotiable Instrument. Some of the statements in these chapters might make a purist sniff, but they do, in clear and rather homely language, succeed in providing the student with the essential background material for his study of the bill of exchange.

Except in respect of cheques the discussion is generally kept very short. This concentration on cheques is understandable in a book intended for young bank officers, but Mr. Richardson should realise that much of the general law of bills of exchange is basic to cheques, and without a reasonably full examination, for example, of such fundamentals as the position of the holder in due course much of the later detail may be largely wasted. In fact, section 29 receives rather more than two pages which is hardly sufficient, and the important section 30 ("presumption of value and good faith") which, in *Chalmers on the Bills of Exchange Act, 1882*, gets ten pages is dismissed with the remark that the "section is straightforward." Are the problems raised by fraud in connection with the negotiation, and the effect of illegal and void consideration to be dismissed so lightly? In contrast, the problem of negligence under section 4 of the Cheques Act, 1957 (the old section 82), admittedly of the first importance to bankers, is analysed in great detail with a pretty full citation of the cases. It is a little difficult to see how the sort of student for whom this book is intended who will usually not be able to refer to the reports, and, if he is, will find them difficult to understand, can find this sort of thing helpful, at any rate without being given some illustrations from the facts of the leading cases. Thus, we are told that negligence has been attributed to a collecting banker who failed to obtain the name of a customer's employers and we are referred to the *Savory* case, in which incidentally the duty was held to go as far as the ascertaining of the name of the customer's husband's employers. But it would be an exceptional student who could work out for himself why such a failure should be evidence of negligence, and I doubt if many would try. This observation applies to most of the twelve or so cases which are cited on this subject.

Incidentally, it is hardly accurate to say that the only difficulties which arise under section 4 are concerned with the meaning of the terms "negligence" and "customer." In the first place the true owner's right to recover in conversion at common law against the banker who has collected a cheque for some other person should be explained. After which something should be

said about the "true owner" himself: one of the most important decisions of recent years (*Marquis of Bute v. Barclays Bank, Ltd.* [1954] 3 All E.R. 365) deals with that very point.

However, Mr. Richardson's handling of the basic principles of the law of bills of exchange is patchy rather than uniformly too short: indeed, it is often excellent, as with, for example, forgery, which causes so much stumbling among students. It is here admirably discussed with the aid of diagrammatic representations of the chain of indorsement.

In conclusion, I must note that in a short final chapter on miscellaneous enactments the subject of stamps, which is of substantial importance to bankers, is briefly but effectively dealt with.

C.

LAW OF PROPERTY IN LAND. Fifth edition. By H. GIBSON RIVINGTON. [London: The "Law Notes" Publishing Offices. 1959. xxvii and 504 and (index) 43 pp. 45s. net.]

NINE years have passed since the last edition of *Rivington*. The new edition is brought out under the joint editorship of Mr. E. Swinfen Green and Mr. R. A. Donell. In the fourth edition the late author expressed his thanks to the former for help then given. Changes in the fifth edition are few, the editors announcing that their main concern has been to bring the book up to date. Although there are three additional chapters the whole book is ten pages less than the fourth edition. The chief purpose of *Rivington* was and is "to provide candidates for the Law Society's Final Examination with a convenient means of revising the more practical elements of real property." The editors add that the book "contains outline statements of many principles of conveyancing and other equity topics which candidates have found useful for final revision."

Perhaps it would be unfair to complain that although Chapter XIV treats of "Alienation *Inter Vivos* Generally" nothing is said about the transfer of registered land save for the effect of acquisition by adverse possession (p. 457) and the exoneration of a purchaser from liability for death duties (p. 297). Doubtless the author expected his book to be read concurrently with one of the established works on conveyancing. Still, it is difficult to see what principle has been followed in selecting the topics treated, for some of them are in substance repetitive of matter found in conveyancing textbooks, e.g., Mortgages (Chapter XII), Registration of Charges (Chapter XIII), Alienation *Inter Vivos* Generally (Chapter XIV), Sales (Chapter XV). In short, it seems to the reviewer that good as *Rivington* is, the book contains either too much or too little.

If the apparent arbitrariness in the author's selection of subjects is accepted not much scope is given for criticism. It may, however, be remarked that here and there a case is mentioned which ought to be followed by a reference to some other case or cases qualifying or limiting the named case. An instance of this is *Coventry Permanent Economic Building Society v. Jones* (p. 110), which should be linked with *Church of England Building Society v. Piskor* [1954] Ch. 553; [1954] 2 All E.R. 85, and *Bridges v. Mees* [1957] Ch. 475; [1957] 2 All E.R. 577.

Those who, like the reviewer, sat under the late author, will acknowledge the justice of the editors' statement that "The work is essentially the product of Mr. Rivington's tutorial genius to which many living practitioners are consciously indebted." *Rivington* bears the strong impress of its author's personality, careful and unhurried, hinting at more than it tells the reader and revealing by many touches the pen of the scholar rather than the whip of the law coach.

F. W. TAYLOR.

INTERNATIONAL LAW THROUGH THE CASES. Second edition. By L. C. GREEN. [London: Stevens & Sons, Ltd. 1959. 874 pp. £3 15s.]

THE first edition of this book was published in 1951 and established itself not only as a very convenient source book for students and others but, by reprinting judgments that were otherwise virtually unobtainable in this country, it made its own contribution to the study of International Law. Since 1951, many important decisions have been taken by the International Court, such as the *Anglo-Norwegian Fisheries* case, the *Nottebohm* case and the *Genocide Conventions* case; from the House of Lords has come the *Dollfus Mieg* judgment and from arbitral tribunals the *Ambatielos* and the *Abu Dhabi Oil* awards. In addition to this, however, since 1951, the status of International Law has become still further recognised and by now even the Bar Council is aware of its existence.

The second edition of Mr. Green's book has, thus, been needed for some time, and at last it has come, delayed, like so many other things, by strikes, but, *mirabile dictu*, at the same price as the first edition.

The book has been kept with the same internal divisioning as before, and into these divisions about fifty new cases have been added. As a result, the numbering of cases, which in the first edition went from 1-209 has had to be abandoned. This was presumably inevitable, but the earlier ease of reference has been lost.

These divisions, however, do not include one dealing with Denial of Justice and Exhaustion of Local Remedies, which is, surely, in practice a vital topic. On this, one would suggest that the book in a later edition might contain the award in the *Finnish Ships Arbitration* (H.M.S.O. 1934), where the arbitrator appointed by the League of Nations dealt in detail with the topic.

The layout and type of the table of cases have been greatly improved. Efforts have been made to overcome the difficult problem of the naming of cases. The *Abu Dhabi Arbitration* is, thus, listed under Abu Dhabi and also under Petroleum Development. One would suggest that this might have been taken further and, for example, the *Dollfus Mieg* case listed under Dollfus Mieg and not merely, as at present, under U.S.A.

All these are, however, trifling matters, and the only relevant fact remains that we are all in the author's debt for the years of work which he has now placed at our disposal.

D. G. VALENTINE.

STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW. By SOMPONG SUCHARITKUL. [London: Stevens & Sons, Ltd. 1959. xlv and 390 pp. £3 10s.]

A REVIEWER who for many years has in these pages fought against the unfortunate and wholly unnecessary rigidity adopted by English courts in the matter of sovereign immunities (see 21 (1958) M.L.R. 165 with further references), will be forgiven for extending an enthusiastic welcome to a book which is devoted to a critical reassessment of practice and doctrine in England and elsewhere. Dr. Sucharitkul is clearly an expert in the field, for before he wrote the present book which, he tells us, in its original form was a thesis approved by the Oxford Faculty of Law for the degree of Doctor of Philosophy, he had written a *thèse* for the University of Paris; this, perhaps somewhat surprisingly, dealt with a closely related subject, *viz., les immunités juridictionnelles des navires publics affectés aux activités commerciales*.

After a short historical introduction the author turns to the question whether and to what extent immunity is allowed by judicial and governmental practice to the trading activities of sovereigns and ambassadors, public vessels and state agencies. There follow chapters which, not without a

measure of repetition, summarise the practice of eight countries and the views of legal writers. In a final part the author propounds and develops his suggestion that immunity should be refused in case of "trading activity."

There can be no doubt that, as Dr. Sucharitkul concludes, "England seems to be the only country that persists in the systematic adherence to the archaic view of absolute immunity" (p. 256). It is a matter of considerable interest and importance to find an answer to the question how this state of affairs could be remedied. The author believes that the conception of "trading activity" is a "criterion which appears less open to ambiguities and therefore to objection than many other vague phrases such as *acta jure gestionis* and *publicis usibus destinata*. At least, trading activities are, with sufficient clarity, generally understood and meaningful in the light of past practical experience." Even if this were true (and there is room for grave doubt), the difficulty is that, at any rate in England, a situation has been reached where only legislation, national or international, is likely to lead out of the existing impasse. To draw the distinction in a form acceptable to a legislator is by no means easy. It would have been useful if Dr. Sucharitkul had devoted his attention to this task which is certainly not discharged by the mere reference to "trading activities."

Although this book is not always a model of precision and conciseness, it makes many points of value, collects much material and is, therefore, a welcome addition to the literature on the subject. That the book does not display much originality is probably inevitable in the case of a subject which for long has attracted so much academic interest as to leave little to be said.

F. A. MANN.

KENNEDY ON CIVIL SALVAGE. Fourth edition. By KENNETH C. MCGUFFIE, B.L. [London: Stevens & Sons, Ltd. 1958. xl and 442 pp. (with index). £5 5s. net.]

WILLIAM RANN KENNEDY was one of that remarkable group of commercial lawyers who during the late nineteenth and early twentieth centuries established, or perhaps one should say confirmed, the reputation of this country with mercantile men all over the world for speedy, impartial and businesslike settlements of commercial disputes. A contemporary of such giants as Lord Sumner, his work in the Court of Appeal stands up well to that of his more famous contemporary, and some of his judgments such as that in *Clemens Horst & Co. v. Biddell Bros.* [1911] 1 K.B. 934 (a dissent) were accepted in the House of Lords as so authoritative that little if anything needed to be added in that august tribunal: it has of course been regarded ever since as the *locus classicus* for the law relating to c.i.f. contracts, on the terms of which so much of the world's international commerce is conducted.

But Kennedy was also an eminent practitioner in the Admiralty Court, and it was doubtless as a result of his experiences before that tribunal that in 1891 he published his work on Civil Salvage which immediately established his reputation as a great authority upon this subject. There was in fact a strange absence of textbooks on this important topic, and to this day apart from chapters in the books on Admiralty practice, and a useful section in Halsbury's *Laws of England*, there is really no other book to which one can turn for authoritative information. This is no doubt due, partly at any rate, to the excellence of Kennedy's work which must have made the attempt to compete with it unattractive to other practitioners in the Admiralty Court.

Kennedy was not only a great lawyer but he had a particularly lucid style of exposition—he was not the leading classic of his year at Cambridge for nothing—and his statements of the law on various aspects of this subject are so carefully and judiciously made that it is not to be wondered at that, time

and again, they have been adopted by later judges in giving judgment as accurate and felicitous statements of the law.

If criticism is to be made of the original work it is probably most fairly directed to the structure and arrangement of the book. The principles of civil salvage were too compactly concentrated in one comparatively short chapter, and the jurisdictional aspects of the work of the Admiralty Court were too much interwoven with the substantive law to enable the reader to get the clearest overall picture of the situation. At the time Kennedy was working the problems which had been mostly before the courts had tended to be concerned with the detailed construction of the various types of salvage agreement which had become popular since the building of steam tugs and with such matters as the estimating of the salvage award which again the development of large steamers had made more difficult and complicated: with these were naturally associated the related problems of apportionment and contribution. It is not surprising therefore that as a working lawyer he tended to get out of balance in his comparatively lengthy handling of these features.

In the present edition a great deal has been done to redress this balance which in the second and third editions had not been disturbed. These had been in the hands of W. R. Kennedy's son, A. R. Kennedy, himself a competent practitioner in the same courts which his father had adorned. A. R. seems to have regarded his father's text as more or less sacred, and contented himself with what was little more than the noting up of new cases and statutes. Even in 1936 when the potential importance of salvage of and by aeroplane should have been pretty clear he contented himself with printing, without comment, one section from the Air Navigation Act, 1920!

As one who had appreciated Mr. McGuffie's work on the fourth edition of Marsden's *Collisions at Sea* (see my review in 18 M.L.R. p. 89), I turned with lively anticipation to his new edition of Kennedy, and I have not been disappointed. His reorganisation and rewriting have been quite as thorough, and his touch has become surer—he has of course in the interval received the appointment of Admiralty Registrar which is an indication of the regard in which his work is held. In his preface Mr. McGuffie speaks of his "profound respect" for Kennedy and his work, but I am glad that this very proper sentiment has not prevented his handling the original work pretty drastically at many points. The result is in many respects a new book, and I am sure that Mr. McGuffie's name will in future always be closely associated with the book. The best of Kennedy's exposition has certainly been retained, but the text has been repeatedly altered, and, while the point of these alterations has sometimes not been apparent to me, on the whole I find them very much an improvement to the book.

Also the amount of added material is so substantial as to make one rub one's eyes a little at the statement in the preface that "the number of pages . . . has been increased to some extent"—magnificent under-statement, for the previous 289 pages of text have now become 442 which is more than half as much again.

There has of course, since 1936, been a substantial increase in the relevant statute law, and also a few decisions of the first importance such as *The Valverde* [1938] A.C. 173 and *The Kafirstan* [1948] A.C. 136—the former of which was in effect overruled by the Crown Proceedings Act, 1947, which enables the Admiralty to enter into effective agreements for the provision of salvage services. Perhaps the most interesting of the statutory additions to the law are those concerned with aircraft which have required substantial additions to the text in a number of places, though compared with the elaborate provisions made in some foreign codes of navigation, such as the Italian, the British efforts are child's play. Up to the present in this country this provision has been largely academic, for Mr. McGuffie notes that as yet there is no reported case in which a salvage award has been made in respect

of services for the saving of property or life from aircraft, though there has been one case of an award in respect of the services of an aircraft (the *American Farmer* (1947) 80 Ll.L.Rep. 672).

At common law the saving of life at sea gave no right to an award either. Statutory provision for this goes back to the period before this book was written, but in the interval the enactments have been altered and expanded and naturally receive a good deal of attention here. But again the practical importance of the legislation has been much less than was expected. Thus Mr. McGuffie observes that no case has been brought in fifty years to claim an award, and only two payments have been made under the provisions of the Merchant Shipping Act, 1894, which enable *ex gratia* payments to be made in such cases.

An analogous subject is that of claims by lifeboat crews which received somewhat cursory treatment in the earlier editions, but on which there is a good deal to be said, as is clear from Mr. McGuffie's excellent handling of the subject. Incidentally he discusses the matter in his new chapter on Voluntaryity instead of in its original context of Salvors, an alteration which can no doubt be justified on grounds of logic, though otherwise questionable I think.

However, the most important contribution made by Mr. McGuffie in this edition is the careful and detailed work which he has done in restating the general principles of the law relating to civil salvage. I have already criticised the over compact character of Kennedy's handling of this subject. He was of course very familiar with the great work done by Lord Stowell to whom we owe the first scientific exposition of the law relating to this subject: a framework which was more than adequately filled in by that great lawyer Dr. Lushington whose contribution to the development of our maritime law has hardly received sufficient recognition.

Incidentally there seems to be room for a good deal of historical work on the Admiralty side of our maritime law and particularly on salvage. The material in Holdsworth is distinctly sketchy and while Mr. McGuffie has collected together much of the history scattered in the original work and has made some additions to it the result is not altogether satisfying.

Kennedy's original chapter on the Essential Ingredients of Salvage ran only to thirty-five pages. Mr. McGuffie provides a separate chapter on each of these three essentials, *viz.*, danger, voluntariness, and success, and these between them run to one hundred and ten pages. Kennedy had, rather awkwardly, discussed the remedies of salvors in his short introductory chapter. This has now become the subject-matter of the leading chapter (thirty pages) in Part IV of the new edition. Again Kennedy had dealt with the problem of jurisdiction in his chapter on "subjects of salvage," a short chapter of twenty-five pages. Mr. McGuffie gives a chapter to each subject, again in his Part IV, and requires some fifty pages.

The above will I hope give some idea of the extent and usefulness of the new editor's work. It will be clear that he has effected a drastic rearrangement as well as a radical enlargement and I for one have no doubt that in doing so he has vastly improved the book.

Great praise is again due to the publishers for the much improved format and layout. Kennedy now takes its place in Stevens' Library of Shipping Law and therefore conforms to the high standard which marks all the volumes in that series. There is a much more detailed Table of Contents which gives one an accurate idea of the contents of the book at a glance, and a new and very much improved index has been provided which will be a boon to practitioners. The marginal headings have been replaced by paragraph headings in the text which not only saves space but is a substantial improvement typographically. On the other hand one cannot but feel sorry that some of the amenities of more spacious days have not been carried forward, such as the list of Admiralty judges since the time of Lord Stowell, and the short memoir of A. R. Kennedy himself.